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Supreme Court of the United States

BOY SCOUTS OF AMERICA and CONNECTICUT RIVERS COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

—v.—

NANCY WYMAN, in her capacity as Comptroller of the State of Connecticut and as a member of the Connecticut State Employee Campaign Committee, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state government's removal of the Boy Scouts from a forum in which they had participated for 30 years because of the Scouts' moral viewpoint and leadership policies unconstitutionally interferes with freedom of expressive association under *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and discriminates on the basis of viewpoint under *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995).

PARTIES TO THE PROCEEDING

The parties to this proceeding are:

1. Petitioners Boy Scouts of America and Connecticut Rivers Council, Boy Scouts of America.

2. Respondents Nancy Wyman, in her capacity as Comptroller of the State of Connecticut and as a member of the Connecticut State Employee Campaign Committee, Carol Carney, in her capacity as Chair of the Connecticut State Employee Campaign Committee, and Margaret Diachenko, Richard Emonds, Paluel Flagg, Christine Fortunato, Burton Gold, Carol Guiliano, Carol Hamilton, Marilyn Kaika, Joan Kelly-Coyle, D'ann Mazzocca, Bernard McLoughlin, Michael Nichols, William Philie, Cheryl Sawina and Noel Thomas, in their capacities as members of the Connecticut State Employee Campaign Committee, and Connecticut Commission on Human Rights and Opportunities.

Boy Scouts of America and Connecticut Rivers Council, Boy Scouts of America are not-for-profit corporations without stockholders. The only affiliate of Boy Scouts of America is Learning for Life, a not-for-profit corporation. Boy Scouts of America charters as local Councils more than 300 not-for-profit corporations such as Connecticut Rivers Council to support Boy Scouting and other Scouting programs in localities nationwide.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Boy Scouts of America and Connecticut Rivers Council, Boy Scouts of America respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit (1a-34a)[1] is reported at 335 F.3d 80 (CA2 2003). The decision of the United States District Court for the District of Connecticut (35a-54a) is reported at 213 F. Supp. 2d 159 (D. Conn. 2002).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on July 9, 2003. The order denying Boy Scouts' petition for rehearing and rehearing en banc was entered on August 26, 2003. On November 12, 2003, Justice Ginsburg extended the time to file a petition for a writ of certiorari until December 24, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves provisions of the First and Fourteenth Amendments to the United States Constitution:

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1. Numbers followed by "a" refer to pages in the bound Appendix submitted with this Petition. Numbers preceded by "A" refer to pages in the Joint Appendix submitted to the Court of Appeals.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ; or the right of the people peaceably to assemble . . . ." U.S. Const. amend. I.
>
> "[N]or shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

The pertinent sections of the United States Code, 42 U.S.C. § 1983, the Connecticut General Statutes, title 46a, sections 71, 74, 76, 81a, 81i, 81l, 81n, and 81r, and Connecticut State Agencies Regulations section 5-262-3 are reprinted in the Appendix to this Petition.

STATEMENT OF THE CASE

This case concerns the decision by the State of Connecticut to remove local Boy Scout councils from a State employee charitable campaign ("the Campaign") in which 900 charities with diverse missions and constituencies participate. The State does not fund the operation of the Campaign. (5a, A 71, A 132, A 289 at 130-32.) The State simply provides the opportunity for private groups to describe themselves in a Campaign Directory and to receive donations through payroll deductions from State employees who choose to donate. (5a, A 70-71, A 132, A 87-88, A 113.)

Boy Scout councils had participated in the Campaign for 30 years before Connecticut removed them. (6a, A 733-34.) In 1999, prior to this Court's decision in *Boy Scouts of*

America v. Dale, 530 U.S. 640 (2000), State officials considered removing the Boy Scouts on the theories that the Boy Scouts violated State nondiscrimination law and that the State itself engaged in unlawful discrimination by including the Boy Scouts in the Campaign (A 578); post-*Dale*, State officials determined that State law prohibiting the State from engaging in discrimination required the exclusion of the Boy Scouts from the Campaign. (A 603-21.)

The court of appeals recognized that the Boy Scouts' policies were "constitutionally protected" under *Dale*. (18a.) The court nonetheless upheld Connecticut's removal of the Boy Scouts from the charitable forum on the ground that Connecticut had not forced the Boy Scouts to change their viewpoint on homosexual conduct (19a), but merely required the Boy Scouts to "pay[] a price" for "exercising its First Amendment rights." (26a n.8.) The Boy Scouts seek review of this ruling.

1. *Boy Scouts of America and Connecticut Rivers Council ("Boy Scouts").* Boy Scouts of America is "a private, not-for-profit organization engaged in instilling its system of values in young people." *Dale*, 530 U.S. at 644. More than 2.5 million youth members and one million adult leaders are active in Cub Scout, Boy Scout and Venturing groups. More than 300 Scouting councils, including the Connecticut Rivers Council, support local Scouting in the United States. (A 733.) The councils are financially self-sustaining: apart from camping and activities fees, they rely on charitable donations. (A 68, A 130, A 733-34.) Without funds from campaigns such as Connecticut's, local councils would be forced to cut Scouting programs to youth. (A 734.)

Connecticut Rivers Council serves 23,900 youth through 8,200 leaders in six counties of Connecticut. (A 733.) Three other local councils in Connecticut also had participated in the Campaign before being excluded. (6a, A 733-34.)

The Boy Scouts are among the most diverse youth groups in the country, involving boys of every race, creed, and economic circumstance. All Scouts are asked to follow the Scout Oath and Law, which embody traditional values. *See Dale*, 530 U.S. at 649. The Scout Oath includes the obligations to do one's "duty to God" and to be "morally straight." (A 732.) By reason of these values, the Boy Scouts do not accept atheists or agnostics, *see Welsh v. Boy Scouts of America*, 993 F.2d 1267 (CA7), *cert. denied*, 510 U.S. 1012 (1993), or avowed homosexual leaders, *see Dale*, 530 U.S. at 653-54.

2. *The Campaign.* Connecticut holds an annual Campaign in which State employees may donate to any of 900 "charitable and public health, welfare, environmental, conservation, and service" groups. Conn. Gen. Stat. § 5-262(a)(3) (1998), (5a, A 70, A 132, A 725.) The charities describe themselves in a Directory distributed to State employees. (A 537-77, A 648-725.) The State Employees' Campaign Committee ("Campaign Committee") administers the Campaign, but the charities bear the costs of the Campaign. (5a, A 71, A 132, A 289 at 130-32.)

The included charities are as diverse as the Campaign's description suggests. They range from ethnic and religious associations, advocacy groups, and organizations devoted to the special interests of various

categories of persons to traditional service organizations. The Directory descriptions, which are required to be accurate, *see* Conn. Gen. Stat. § 21a-190h (1998), include charities such as Catholics for a Free Choice ("pro-choice organization of Catholics"), La Casa De Puerto Rico (group furthering "social, economic and political well being of the Puerto Rican community"), Girl Scouts Council of Southwestern Connecticut (group "for girls age 5-17"), the Indian Law Resource Center (an "Indian organization providing free legal help to Native American tribes"), and the Fellowship of Christian Athletes (group reaching "students for Jesus Christ"). (A 546, A 669; A 555; A 683; A 671; A 569.)

The Campaign includes gay rights advocacy and legal defense organizations. The Directory entry for the Stonewall Foundation states that it "[i]mproves attitudes" toward homosexuality and "educates on behalf of lesbian, gay, bi-sexual, transgendered people." (A 567, A 709.) The Stonewall Foundation does not allow persons opposed to the gay rights agenda to "speak" for it or "represent" it. (A 353 at 67-68.) Lambda Legal Defense and Education Fund is a gay rights legal advocacy organization. (*See* A 672.) Parents, Families & Friends of Lesbians and Gays is a support group that seeks to counter traditional religious and moral views concerning homosexuality. (A 567, A 1030.)

3. *State Officials Remove Boy Scouts from the Campaign.* In October 1999, on the basis of the New Jersey decision later reversed by this Court in *Dale*, the Executive Director of the Connecticut Commission on Human Rights & Opportunities (the "CHRO") wrote an unsolicited letter to the Campaign Committee urging it to ask the CHRO for a

ruling on the Boy Scouts' participation in the Campaign. (A 578, A 159-60.) The Director stated that the New Jersey decision "impacts the continued participation of the Boy Scouts of America" in the Campaign, that the Boy Scouts' stance on homosexuality "may violate our antidiscrimination laws," and that allowing them in the Campaign "potentially makes the State a party to the discrimination." (A 578.)

The Campaign Committee then requested the CHRO ruling. (A 74, A 133, A 580.) Respondent Wyman, Connecticut's Comptroller and a Campaign Committee member, urged the Committee to "immediately begin to develop language for the upcoming year's application in an effort to identify and disqualify from the Campaign any charitable organization that *advances a discriminatory message or practice.*" (A 853 (emphasis added).) She explained: "If the BSA alters its position on sexual orientation . . . I would welcome it back into the Campaign." (A 853.)[2]

The CHRO issued its initial opinion on May 12, 2000, while *Dale* was still pending in this Court. (A 581-92.) The CHRO deferred formally ruling on the question whether the Scouts' policy violated State nondiscrimination law, but stated that the Scouts' participation in the Campaign

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2. The CHRO and the Campaign Committee showed much hostility to Boy Scouts' moral viewpoint. (*See* 27a; A 400 (CHRO Commissioner states that Boy Scouts' views are "illegitimate"); A 451 (CHRO Commissioner says "I take issue with an organization that almost teaches discrimination. Okay?").) Despite the fact that many charities are limited to persons of one sex, ethnicity, religion or sexual orientation, the State did not even consider removing any other group as discriminatory. (A 164-65 at 49-50, A 290 at 135, A 292 at 142-43.)

was illegal under statutes prohibiting the *State* from discriminating on the basis of sexual orientation. (A 591-92, A 585-86, 59a-61a.) The CHRO concluded that, because the Scouts' "policy of excluding homosexuals from participation violates Connecticut's Gay Rights Law . . . the Committee's inclusion of Boy Scouts member agencies in the Campaign also violates Connecticut's Gay Rights Law." (A 592.) The CHRO insisted that this same result would follow "even if the U.S. Supreme Court were to overrule *Dale* and allow the BSA to discriminate." (A 591.)

Three days after the CHRO opinion, the Chair of the Campaign Committee ordered the Scouts removed from the 2000 Campaign, without vote of the Committee.[3] (A 274 at 70, A 593-601.) Petitioners sued the officers of the State Campaign Committee on June 7, 2000. Less than three weeks later, on June 26, 2000, this Court decided *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), reversing the New Jersey decision. The Campaign Committee held an "emergency meeting" to determine the effect of *Dale*. (A 281 at 100-01.) On February 8, 2001, the CHRO ruled that *Dale* did not affect its May 2000 opinion that the Boy Scouts must be excluded from the Campaign to avoid State promotion of discrimination. (A 603-21.) However, the CHRO made no finding that Boy Scouts themselves engaged in any illegal activity.[4]

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3. Funds donated by individuals to Boy Scout councils in the past four Campaigns remain in escrow. (A 1275.)

4. In November 2000, the CHRO 1) held that the Scouts' leadership policy is protected by *Dale*, 2) held that the Scouts' employment policy would have to be examined on a case by case basis under

4. *Proceedings in the District Court.* After permitting the CHRO to intervene as a co-defendant (A 63), the district court granted summary judgment against the Boy Scouts on all claims. (35a-54a.) On the First Amendment claims, the district court recognized that the Boy Scouts' policies were "lawful and constitutionally-protected" speech under *Dale* (50a), but believed the State nonetheless could treat participation by "a known discriminator as a beneficiary" as State "furtherance" of discrimination impermissible under State law. (43a-44a.)[5]

The district court believed *Dale* inapplicable because the State was not "forcing the BSA to admit homosexuals." (48a.) The district court analyzed the case under *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985), which addressed the exclusion of political and legal advocacy groups from the federal employee charitable campaign, then limited to charities engaged in "health and welfare services." The district court concluded that the Connecticut Campaign was a "nonpublic forum," and accordingly that exclusion of the Boy Scouts need only be viewpoint neutral and reasonable. (45a.) The district court believed the exclusion of the Boy Scouts did not constitute viewpoint discrimination because, even though the Boy Scouts' leadership policies were constitutionally protected, State law forbade State support of discrimination.

State law in light of BFOQ exemptions, and 3) declined to rule on the Scouts' youth leadership policy. (A 644-45.)

5. The Complaint also asserted that the State misapplied State nondiscrimination law, including law prohibiting promotion of homosexuality by the State. (A 30-32.) The State law claims are not presented in this Petition.

(48a.) The court recognized that the State excluded the Boy Scouts while at the same time including charities expressing other views on the same topics: "'groups that teach *moral values*, groups that seek to build *character*, groups that serve *youth*, groups that serve *one sex*, groups with a *religious perspective*, or groups that take a *position on the morality of homosexual conduct.*'" (49a (emphasis added).) However, the court concluded that "[t]he record does not support the BSA's intimation of discrimination by such groups." (49a.)

5. *The Opinion of the Court of Appeals.* The Second Circuit affirmed, in an opinion by Judge Guido Calabresi. (1a-34a.) The court noted that the "sole basis for the Committee's decision to remove the BSA from the Campaign" was the Boy Scouts' policy concerning homosexuality. (18a.) The Second Circuit accepted that, for purposes of summary judgment, "the removal of the BSA from the Campaign was triggered at least to some extent by the BSA's exercise of what the Supreme Court has held to be a constitutionally protected right." (18a (citing *Dale*).)

Yet the Second Circuit held *Dale* inapplicable on the ground that Connecticut's "conditioned exclusion" of the Boy Scouts from the Campaign "does not rise to the level of compulsion." (19a.) The court considered this case governed by "two lines of First Amendment cases": nonpublic forum cases (like *Cornelius*) and cases of unconstitutional conditions on benefits. (19a-20a.) The Second Circuit believed it made "no difference under which line we analyze it" because, "[w]hether viewed as denial of access to a nonpublic forum or as the denial of a government benefit, the BSA's exclusion is constitutional if and only if it was (1) viewpoint neutral and (2) reasonable." (20a.)

The court found the exclusion of the Boy Scouts to be viewpoint neutral because it was directed against the Boy Scouts' policies "as conduct, not as expression" and thus was "not obviously viewpoint discriminatory." (22a.) The court acknowledged that removing the Boy Scouts from the forum because of their stance on homosexuality imposed an "adverse impact upon a given viewpoint" (23a), but thought that this was not viewpoint discriminatory because the legislature's purpose in enacting the Gay Rights Law was to protect homosexuals from discrimination rather than to punish the Boy Scouts' viewpoint. (24a-26a.) Connecticut had not directly "prevented the BSA from exercising its First Amendment rights," but imposed a regulatory scheme under which, "as it happens, the BSA pays a price for doing so." (26a n.8.)

The court below found the Boy Scouts' selective enforcement charge "a more serious issue" (28a-29a), but believed there was no evidence from which it could be concluded that any other group participating in the Campaign also discriminated under Connecticut law (29a-30a).

Finally, the Second Circuit found exclusion of the Scouts from the Campaign to be "a reasonable means of furthering Connecticut's legitimate interest in preventing conduct that discriminates on the basis of sexual orientation." (31a.)

REASONS FOR GRANTING THE PETITION

This case presents a First Amendment issue of national importance: May a state exclude an otherwise-eligible organization from participating in a state forum or

program because of membership policies that preserve the organization's values and form the organization's expressive identity? The decision below is in direct conflict with this Court's precedents and is one of a growing number of lower court cases reaching inconsistent results.

Here, the State of Connecticut has excluded Boy Scouts from a charitable campaign in which 900 groups of all different kinds participate, solely because of Boy Scouts' constitutionally protected views and membership policies.

The Second Circuit's holding that indirect interference with rights of expressive association is permissible warrants this Court's review. The decision below conflicts with *Dale* and a long line of decisions of this Court holding that the First Amendment prohibits government from interfering with a private group's membership decisions in a manner that significantly burdens the group's message and identity. *See, e.g., Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Healy v. James*, 408 U.S. 169 (1972). The decision below would limit *Dale* to instances of direct regulation of group membership, allowing states to impose whatever other penalties they like on private expressive organizations whose beliefs and membership policies do not conform to the orthodoxies of state officials.

The court of appeals' purported bright-line distinction between direct prohibition and indirect burden also conflicts with this Court's decisions holding that government may not exclude an otherwise-qualified group from a forum or program because of the group's viewpoint,

or condition an otherwise-available benefit on abandonment of First Amendment rights. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995).

The decision below represents an acute threat to First Amendment principles of free speech and association and is part of a growing pattern of state agency actions and lower court decisions that have excluded the Boy Scouts, as well as traditional religious groups, from government facilities and programs because of their views and membership requirements on matters of religious belief, morality, and sexual conduct. The issue is a recurrent one on which the lower federal courts are divided and in need of guidance from this Court.[6]

A. The Decision Below Conflicts with This Court's Decisions in *Boy Scouts of America v. Dale* and Other Cases Protecting the Freedom of Expressive Association

The decision below conflicts sharply with this Court's decisions in *Boy Scouts of America v. Dale* and other cases protecting the freedom of expressive association of private, non-commercial groups.

In *Dale*, this Court held that a state may not, through its nondiscrimination statutes, prohibit the Boy Scouts from adhering to their viewpoint as expressed in their internal

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6. This case warrants plenary review. However, because *Dale* clearly applies to both direct and indirect interference with freedom of expressive association, we respectfully suggest that the Court may wish to consider summary reversal. Petitioners respectfully request that the Court invite the Solicitor General to express the views of the United States.

leadership policy. 530 U.S. at 655 (leadership policy is Boy Scouts' "method of expression"). New Jersey's application of its law was a direct regulation of the Scouts' membership: The Court noted that the law "directly and immediately affects associational rights . . . that enjoy First Amendment protection." *Id.* at 659. The Second Circuit, however, wrongly seized on this statement to justify discriminatory treatment so long as it fell short of direct interference with associational rights. This misreads *Dale*.

The Court in *Dale* stated that interference with rights of expressive association may "take many forms." *Id.* at 648. *Dale* nowhere suggested that the freedom of expressive association is limited only to cases of direct state regulation of group membership. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958) (required disclosure of the organization's membership lists was an unconstitutional burden on association even though the state had "taken no direct action . . . to restrict the right of members to associate freely"); *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) ("Government actions that may unconstitutionally infringe upon this freedom can take a number of forms. Among other things, government may seek to *impose penalties or withhold benefits* from individuals because of their membership in a disfavored group." (Emphasis added)).

The Second Circuit's direct/indirect distinction is likewise in plain conflict with *Healy v. James*, 408 U.S. 169 (1972). This Court held that a state college in Connecticut had unconstitutionally interfered with a student political organization's First Amendment freedom of association by denying official recognition and access to university facilities because of the organization's affiliation with the

national Students for a Democratic Society. Noting that "[a]mong the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs," the Court held that "[t]here can be no doubt that denial of official recognition, without justification, to college organizations burdens or abridges that associational right." 408 U.S. at 181. The Court squarely rejected the notion that only direct state interference with membership decisions fell within the scope of the First Amendment's prohibition:

> *[T]he Constitution's protection is not limited to direct interference with fundamental rights.* The requirement in *Patterson* that the NAACP disclose its membership list was found to be an impermissible, though indirect, infringement of the members' associational rights. Likewise, in this case, *the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the [State's] action.* We are not free to disregard the practical realities. Mr. Justice Stewart has made the salient point: 'Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.'

Id. at 183 (emphasis added; citations omitted); *see id.* at 185-186 ("[T]he Court has consistently disapproved governmental action imposing criminal sanctions *or denying rights and privileges* solely because of a citizen's association with an unpopular organization." (Emphasis added)).

The opinion below also conflicts with the unanimous decision in *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557 (1995), holding that a state may not condition a veterans' parade permit on inclusion in the parade of persons whose views the veterans did not wish to have identified with their expression. In one sense, the state court order requiring plaintiffs' inclusion in the veterans' parade was a direct regulation of the veterans' expression. But *Hurley* also should be understood as a case of "conditioned exclusion": the price of a parade permit was state control over the veterans' decisions concerning who could participate. Yet this Court held that the state could not leverage permission to hold a parade into control of the content of the veterans' parade. 515 U.S. at 579-81.

Here, Connecticut cannot leverage permission to participate in the charitable Campaign into control over the internal membership policies (and thus the "method of expression" and identity) of the Boy Scouts. *Dale*, 530 U.S. at 655. Connecticut's decision to apply its Gay Rights Law in this "peculiar way" is directly contrary to "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 572-73.

In recent years, Connecticut Rivers Council and the three other local councils in Connecticut have received over $10,000 per year in earmarked and general contributions from the Campaign. (A 1026-29.) The loss of that revenue assuredly would "significantly burden the Boy Scouts' desire to not 'promote homosexual conduct as a legitimate form of behavior.'" *Dale*, 530 U.S. at 653; *see Cornelius*, 473 U.S. at 799 ("without the funds obtained from solicitation in

various fora, the organization's continuing ability to communicate its ideas and goals may be jeopardized"). Nor does the financial penalty tell the whole story. By preventing the Boy Scouts from being listed in the Directory and soliciting contributions via the forum of the Campaign, Connecticut is directly censoring the Boy Scouts' speech – thereby imposing an intangible but substantial burden on constitutional rights of the highest order. *See Cornelius*, 473 U.S. at 799 ("The brief statements in the [Combined Federal Campaign] literature directly advance the speaker's interest in informing readers about its existence and goals."). Moreover, by ostracizing the Boy Scouts from the Campaign on the ground that it engages in "discrimination," the State has imposed an undeniable reputational stigma on the Boy Scouts. The combined effect of this triple penalty – striking as it does at the Boy Scouts' financial, expressive, and reputational interests – would "just as surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs," 530 U.S. at 654, as did New Jersey's reinstatement order in *Dale*.

The Second Circuit's decision flouts the principles set forth in this Court's decisions in *Dale*, *Hurley*, *Roberts*, *Healy*, and *Patterson* and merits this Court's review.

B. The Decision Below Conflicts with This Court's Decisions in *Rosenberger* and Other Cases Holding That Government May Not Exclude an Otherwise-Qualified Expressive Group from a Forum or Program on the Basis of Viewpoint

The decision below conflicts with this Court's decisions forbidding viewpoint-based deprivations. Exclusion from a forum, denial of a benefit, or imposition of

a financial penalty on the basis of viewpoint violates the First Amendment. *E.g.*, *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 831-32 (1995) (viewpoint discrimination to "select[] for disfavored treatment" a student religious publication by excluding it on the basis of its religious character from a forum available to publications); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 393-94 (1993) (viewpoint discrimination to exclude religious group because of its perspective from use of school facilities open to social and other groups, even on assumption that forum is nonpublic); *see Good News Club v. Milford Central School*, 533 U.S. 98, 107 (2001) (viewpoint discrimination to exclude club from use of school facilities "based on its religious nature"). The Second Circuit's decision utterly fails to distinguish these viewpoint discrimination cases.[7]

Here, it is undisputed that the Boy Scouts were excluded from the Campaign because of their views and leadership policies with respect to homosexuality. The court of appeals conceded that application of Connecticut's law had "a differential adverse impact upon a given viewpoint." (24a.) However, on the basis that the law's *purpose* was not

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7. No matter what kind of forum the Campaign is deemed to be, viewpoint-based discrimination is unconstitutional. *See Rosenberger*, 515 U.S. at 829; *Cornelius*, 473 U.S. at 811. The Second Circuit characterized the Campaign as "nonpublic." (20a.) Unlike the federal campaign in *Cornelius*, however, Connecticut's Campaign does not exclude public advocacy or legal defense groups, but admits some 900 groups advocating many different views. Because Connecticut has not reserved the Campaign "for certain groups or for the discussion of certain topics," *Rosenberger*, 515 U.S. at 829 (citing *Cornelius*), the Campaign is probably better characterized as a limited public forum.

to punish viewpoints, but only to punish conduct reflecting those viewpoints, the court concluded that the law could be applied to exclude the Boy Scouts. (24a-26a.)[8]

Such an approach cannot be reconciled with this Court's decision in *Good News*. In *Good News*, the school board argued that it was permitted (or required) by state law to exclude groups using school premises for religious purposes. 533 U.S. at 107 n.2. Without inquiring into the purpose of the state law, the Court rejected this contention: "Because we hold that the exclusion of the Club on the basis of its religious perspective constitutes unconstitutional viewpoint discrimination, it is no defense for Milford that purely religious purposes can be excluded under state law." *Id.*

Similarly, *Dale* and *Hurley* looked not to the underlying purposes of the state statutes at issue, but at whether the states applied those laws so as to penalize the views of expressive groups. In *Hurley*, this Court noted that the nondiscrimination statute at issue "does not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of

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8. In rejecting the selective enforcement charge, the court turned a blind eye to evidence of open hostility on the part of the Campaign Committee and the CHRO to Boy Scouts' moral view. (*See* 27a, A 400, A 451.) As the record reflects, groups such as the Stonewall Foundation would exclude from membership and employment persons who espouse the view that homosexuality is immoral. (A 352-53.) The Second Circuit's decision thus permits Connecticut to include in the Campaign groups whose membership policies express the view that homosexual conduct is morally right, while excluding groups whose membership policies express the view that homosexual conduct is morally wrong.

discriminating against individuals." 515 U.S. at 572. Nevertheless, the First Amendment was violated because the statute had "been applied in a peculiar way" to "essentially requir[e] petitioners to alter the expressive content of their parade." *Id.* at 572-73. Likewise, in *Dale*, this Court recognized that New Jersey's purpose in adopting the nondiscrimination law was "to prevent discrimination," 530 U.S. at 656, but found that New Jersey's application of the law unconstitutionally interfered with Boy Scouts' "expressive message," *id.* at 661.

That is what occurred here. The Scouts' membership policies are bound up with the Scouts' expression, as this Court recognized in *Dale*. 530 U.S. at 650-52. Lower courts may not divorce the Boy Scouts' membership policies from Boy Scouts' viewpoint, because to penalize the former is to penalize both. *See id.* at 650 (framing the issue as whether interference with membership policies "would significantly affect the Boy Scouts' ability to advocate public or private viewpoints"). To exclude the Boy Scouts from a forum based on the values they hold and the conduct they require of their members is to exclude Boy Scouts based on viewpoint and identity. That *is* viewpoint discrimination. To apply a lower standard of First Amendment analysis to an exclusion from a forum based on a membership policy presents a direct conflict with this Court's forum cases.

C. The Decision Below Conflicts with This Court's Decisions Holding That Government May Not Require Expressive Groups to Abandon First Amendment Rights As a Condition of Eligibility

The Second Circuit's decision also conflicts with numerous decisions of this Court holding that government may not condition a benefit for which a group is otherwise eligible on abandonment of First Amendment freedoms. *See, e.g., Thomas v. Review Board*, 450 U.S. 707, 716 (1981) ("a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program"); *Speiser v. Randall*, 357 U.S. 513, 518 (1958) ("To deny [tax] exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech."); *see also United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 826 (2000) ("special consideration or latitude is not accorded to the Government merely because the law can somehow be described as a burden rather than outright suppression").

More specifically, this Court has consistently held that a group may not be excluded on the basis of its views or expressive identity from a forum or benefit for which it otherwise qualifies. *E.g., Good News Club v. Milford Central School*, 533 U.S. 98, 106-12 (2001); *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 828-37 (1995); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 393-94 (1993); *Widmar*

v. Vincent, 454 U.S. 263 (1981); *Healy v. James*, 408 U.S. 169 (1972).

The Second Circuit recognized the applicability of the unconstitutional conditions doctrine, but believed that it affords less protection to the freedom of expressive association than to most other First Amendment rights. Where freedom of association is involved, the court held that government may enforce a "conditioned exclusion" from a benefit, so long as the condition is viewpoint-neutral and reasonable. (19a.) The court asserted that the unconstitutional conditions doctrine permits conditions on associational rights as long as government does not "discriminate invidiously" against particular ideas. (20a). For that proposition, the court cited *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983), and *NEA v. Finley*, 524 U.S. 569 (1998), two cases involving government funding of certain types of speakers.

This plainly does not distinguish unconstitutional conditions cases. First, nothing in this Court's cases supports a lesser standard of First Amendment protection for freedom of expressive association than for other First Amendment claims. *Healy v. James*, for example, involved conditional deprivation of a benefit based on a group's expressive association. 408 U.S. at 185-86. The Second Circuit's position is also implausible: recipients of government benefits can no more be forbidden, as a condition of receiving them, from joining advocacy groups than from writing letters to the editor.

Second, the cases relied on by the Second Circuit are inapposite. This is not a case in which government employs

private speakers to carry out a government program or message. *See Legal Services Corporation v. Velazquez*, 531 U.S. 533, 542 (2001) (funding program was "designed to facilitate private speech, not to promote a government message"); *Rosenberger*, 515 U.S. at 834 (the government "does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers"). Here, Connecticut is not selectively funding particular groups because of their special attributes, *e.g.*, *Regan* (veterans); or for carrying a state message, *e.g.*, *Rust v. Sullivan*, 500 U.S. 173 (1991); nor is it fashioning criteria for judging artistic or literary merit, *e.g.*, *Finley*. Indeed, Connecticut does not *fund* any group at all. It merely gives private groups access to the opportunity to receive charitable donations from its employees. Conditioning that access on abandonment of a group's First Amendment rights is a classic unconstitutional condition.

The Second Circuit's misinterpretation of the unconstitutional conditions doctrine has sweeping implications. If Connecticut may condition the Boy Scouts' access to the Campaign here on State control of the group's internal membership policies, any state may similarly condition access to any state program or benefit: social services, welfare, housing, use of public facilities, even tax-exempt status. The decision below furnishes hostile state officials with a roadmap for circumventing *Dale* and eviscerating freedom of association. The State cannot be permitted thus to accomplish through the back door of "conditioned exclusion" what it could not do through the front door of direct regulation.

D. This Case Presents a Recurring First Amendment Issue of National Importance, Affecting the Rights of Boy Scouts and Religious Charities Nationwide

The decision below licenses state and local governments to punish the Boy Scouts for their views and threatens the First Amendment rights of all expressive associations, and especially religious groups, to maintain and adhere to their convictions on moral or religious issues without being "select[ed] for disfavored treatment" at the hands of state government. *Rosenberger*, 515 U.S. at 831.

1. In the words of one district court, "lawsuits like this one are the predictable fallout from the Boy Scouts' victory before the Supreme Court." *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259, 1263 (S.D. Cal. 2003). But while these cases may be predictable – and while the Boy Scouts vigorously contest them – their cumulative impact threatens seriously to undermine Boy Scouts' ability to carry out their associational mission. In addition to Connecticut, local governments in Florida and California, while recognizing that after *Dale* they cannot outlaw the Boy Scouts' membership policies, have instead invoked ordinances prohibiting discrimination on the basis of sexual orientation to justify excluding the Boy Scouts from public facilities.

a. *Barnes-Wallace v. Boy Scouts of America*: In *Barnes-Wallace*, private plaintiffs (a lesbian couple, an agnostic couple and their respective minor sons) persuaded the district court to hold that San Diego had violated the Establishment Clause by having entered into a long-term lease of campgrounds with the local Boy Scout council. The lease in question is part of a City program in which the City

leases property to over 100 secular and religious nonprofits in return for community service. The City's leases require the Boy Scouts to build and administer campgrounds and recreational facilities available to the entire San Diego community on a first-come first-served basis at no expense to the City. In return, Boy Scouts are allowed to maintain an office as well as meet and camp on the site with the rest of the community. Relying on the Second Circuit's decision in the present case, the district court held, on partial summary judgment, that "[t]he government's decision to exclude organizations with discriminatory membership policies is viewpoint neutral when the purpose for the decision is to protect persons from the effects of discrimination and not to exact a price for the organization's protected expression." 275 F. Supp. 2d at 1287.

b. *Evans v. City of Berkeley*, 127 Cal. Rptr. 2d 696 (Cal. Ct. App. 2002): The City of Berkeley for many years has permitted nonprofit groups to berth their boats rent-free at the City marina. After 60 years, Berkeley excluded Sea Scouts on the ground that Boy Scouts of America's internal membership policies discriminate on the basis of sexual orientation. The California Court of Appeal rejected the Sea Scouts' First Amendment challenge on the ground that they "remained free to exercise their First Amendment rights, and berth their boats at the marina, albeit without a city subsidy. Berkeley's actions have not required appellants to stop discriminating in these regards, which they remain free to do." 127 Cal. Rptr. 2d at 702. The Sea Scouts must now pay the City $5000 per year in berthing fees. An appeal is currently pending before the California Supreme Court. No. S11261 (Cal. March 26, 2003).

c. *Boy Scouts of America v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001): The local Boy Scout council in Broward County, Florida for many years had been permitted to make after-hours use of public school facilities. However, in the aftermath of this Court's decision in *Dale*,

> the School Board . . . concluded that *the Scouts are ineligible to rent and lease school facilities like any other private group* because the Scouts' membership policies discriminate on the basis of sexual orientation, and therefore violate the School Board's anti-discrimination policy.

136 F. Supp. 2d at 1297 (emphasis added). Had the School Board's decision been permitted to stand, the impact on local, urban and economically disadvantaged Scouts – who had been forced either to drop out or to travel to less convenient locations for meetings – would have been severe. Unlike the courts below, however, the district court in *Till* found it obvious that the Scouts were being excluded from school facilities because of "the exercise of" their "First Amendment right to freedom of expressive association." *Id.* at 1308. Accordingly, the district court held that the School Board acted unconstitutionally by "excluding the Boy Scouts from Broward school facilities based on their anti-gay viewpoint." *Id.* at 1310-11.

The current cases against Boy Scouts underline the vital importance of this Court's long-standing teaching that First Amendment freedoms of speech and expressive association are "'protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.'" *Healy*, 408 U.S. at 183

(quoting *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960)). In reality, there is little practical difference between a "direct" prohibition enforced by a fine, and imposition of an "indirect" burden in the form of penalty or exclusion. For example, the "indirect" burden on the Boy Scouts of losing its leases in San Diego far exceeds any ordinary civil fine in impact. Yet, according to the Second Circuit, although San Diego could not fine the Boy Scouts $1000 for adhering to their leadership policy, it could rescind their 25 year lease.

2. The importance of the decision below extends far beyond its impact on the Boy Scouts. The issue of what type of constitutional scrutiny applies to the "conditioned exclusion" of an expressive group from a government forum because of the group's views and membership criteria is not confined to the Boy Scouts and the Connecticut Campaign. First, there are 150 charitable campaigns run by states, public universities, and local governments. More than 140,000 charities participate. Some campaigns explicitly exclude religious charities because of their religious viewpoint. *E.g.*, Ala. Code § 36-1A-5(b)(4) (2003) (excluding "religious activities" from "basic health and human care service" in the Alabama State Employee Combined Charitable Campaign); 5:4 Del. R. 976, Exec. Order No. 20, § II(L)(2) (Oct. 1, 2001) (excluding organizations "with programs which exist solely to advocate particular religious or ethical beliefs"); Fla. Stat. Ann. § 110.181(1)(h)(2) (West 2003) (excluding organizations "whose activities are primarily political, religious, professional, or fraternal in nature"); Ga. Code Ann. § 45-20-51(2)(E) (West 2003) (excluding "religious organization" from the definition of "charitable organization," with exceptions); Wash. Rev. Code

§ 19.09.020 (2002) (excluding "religious or political activities" from definition of "charitable organization").

Second, government officials of all kinds – state officers, state university officials, school boards – are excluding religious and other groups from access to forums or programs for which they are otherwise eligible, on account of their religious or moral values and their efforts to maintain their distinctive identities. For example, high school student religious groups, entitled to meet along with other student groups during noninstructional time pursuant to the Equal Access Act (20 U.S.C. §§ 4071-4074) and *Westside Board of Education v. Mergens*, 496 U.S. 226 (1990), have faced "conditioned exclusion" based on their religious identity and membership policies. *See, e.g., Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839 (CA2), *cert. denied*, 519 U.S. 1040 (1996) (school district may condition student religious group meetings on interference with group's choice of officers in some circumstances); Thomas C. Berg, *Religious Liberty in America at the End of the Century*, 16 J.L. & Religion 187, 224-25 (2001); Michael S. Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653 (1996). Officials at many state university campuses have likewise sought the "conditioned exclusion" of student religious groups from forums or benefits. *See* Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369, 369-70 (1994); Paulsen, *supra*, at 668-72.

All too many state officials are hostile both to the First Amendment rights of dissenting groups and to this Court's decisions in *Dale*, *Rosenberger*, and *Good News*. The Second Circuit's decision in this case, absent this Court's review, would empower state officials to retaliate against groups whose views and internal membership practices they find objectionable.

E. The Decision Below Conflicts with Decisions of Other Lower Courts

In addition to the conflict with this Court's decisions, the decision below conflicts with the decisions of other federal courts.

1. Two circuits have treated the Ku Klux Klan much more generously than the Second Circuit has treated the Boy Scouts. The Fifth and Eighth Circuits have required the inclusion of the Klan in state forums, holding that a state's exclusion of an otherwise-eligible expressive association on the basis that its viewpoint is discriminatory violates the First Amendment: *Cuffley v. Mickes*, 208 F.3d 702 (CA8 2000), *cert. denied*, 532 U.S. 903 (2001); *Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board*, 578 F.2d 1122 (CA5 1978).

In *Cuffley*, the Missouri Highway and Transportation Commission denied the Klan's petition to participate in its Adopt-A-Highway program. The Eighth Circuit held that Missouri had no legitimate, viewpoint-neutral reason for excluding the Klan from the program. Missouri had argued, *inter alia*, that it could exclude the Klan from the Adopt-A-Highway program because the Klan's membership policies

are discriminatory, even if it could not directly compel the Klan to abandon those policies. 208 F.3d at 707-08.

The Eighth Circuit assumed *arguendo* that the Klan's membership policies, which "discriminate[] . . . on the basis of race, religion, color, and national origin," violated State nondiscrimination laws. *Id.* at 708. Relying on *Roberts*, the Eighth Circuit reasoned that "direct application" of a nondiscrimination law to "requir[e] the Klan to accept non-'Aryans' would significantly interfere with the Klan's message of racial superiority and segregation," and "violate the Klan's freedom of political association." *Id.* Missouri's indirect pressuring of the Klan to change its message, however, would have the same effect: "Requiring the Klan essentially to alter its message of racial superiority and segregation by accepting individuals of other races, religions, colors, and national origins in order to adopt a highway would censor its message and inhibit its constitutionally protected conduct." *Id.; see id.* at 709 ("[T]he State simply cannot condition participation in its highway adoption program on the manner in which a group exercises its constitutionally protected freedom of association."). That holding unmistakably conflicts with the Second Circuit's holding that Connecticut's exclusion of the Boy Scouts does not infringe their expressive association because "conditioned exclusion does not rise to the level of compulsion." (19a.)

Similarly, in *Knights of the Ku Klux Klan*, the Fifth Circuit held that a school board could not exclude the Klan from after-hours use of school facilities. The Fifth Circuit concluded that a preliminary injunction should issue against the school board's "selective denial of a dedicated public

forum to a group because of its ideas or membership policies." 578 F.2d at 1128.

2. Other circuits similarly have held that speakers or groups may not constitutionally be excluded from government forums for no other reason than government disagreement with their viewpoints: *Brown v. California Department of Transportation,* 321 F.3d 1217, 1221-25 (CA9 2003) (state's policy of allowing American flag to hang on highway overpass fence, a nonpublic forum, while removing displays with "unpatriotic" messages was not reasonable or viewpoint neutral); *Sons of Confederate Veterans, Inc. v. Commissioner of Virginia Department of Motor Vehicles*, 288 F.3d 610 (CA4 2002) (state's special license plate program was a nonpublic forum and thus constituted private, rather than government, speech, as to which viewpoint discrimination was impermissible); *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543, 1548-50 (CA11 1997) (state law prohibiting any state college or university from spending funds to sanction, recognize, or support any group that promotes homosexuality was viewpoint discriminatory when groups with other viewpoints were allowed to be funded).

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE OFFICE OF THE CLERK

Supreme Court of the United States

BOY SCOUTS OF AMERICA and CONNECTICUT RIVERS COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

—v.—

NANCY WYMAN, in her capacity as Comptroller of the State of Connecticut and as a member of the Connecticut State Employee Campaign Committee, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2002

(Argued: April 23, 2003 Decided: July 9, 2003)

Docket No. 02-9000

BOY SCOUTS OF AMERICA and CONNECTICUT RIVERS COUNCIL, BOY SCOUTS OF AMERICA,

Plaintiffs-Appellants,

—v.—

NANCY WYMAN, in her capacity as Comptroller of the State of Connecticut and as a member of the Connecticut State Employee Campaign Committee, CAROL CARNEY, in her capacity as Chair of the Connecticut State Employee Campaign Committee, MARGARET DIACHENKO, RICHARD EMONDS, PALUEL FLAGG, CHRISTINE FORTUNATO, BURTON GOLD, CAROL GUILIANO, CAROL HAMILTON, MARILYN KAIKA, JOAN KELLY-COYLE, D'ANN MAZZOCCA, BERNARD MCLOUGHLIN, MICHAEL NICHOLS, WILLIAM PHILLIE, CHERYL SWAIN, NOEL THOMAS, in their capacities as members of the Connecticut State Employee Campaign Committee,

Defendants-Appellees,

COMMISSION ON HUMAN RIGHTS & OPPORTUNITIES,

Intervenor-Defendant-Appellee,

CONNECTICUT COALITION FOR LESBIAN, GAY, BISEXUAL & TRANSGENDER CIVIL RIGHTS, CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, INC. and GAY & LESBIAN ADVOCATES & DEFENDERS,

Movants.

Before:

CALABRESI, F.I. PARKER, and SACK,
Circuit Judges.

The Boy Scouts of America and its Connecticut River Council appeal the decision of the United States District Court for the District of Connecticut (Eginton, *J.*), granting summary judgment to the defendants, agencies of the State of Connecticut that, based on the Boy Scouts' policy of excluding homosexuals from membership and employment, barred the Boy Scouts from a state workplace charitable campaign. We agree with the district court that defendants' actions violated neither the Boy Scouts' First Amendment right to expressive association nor Connecticut State law.

Affirmed.

GEORGE A. DAVIDSON (Carla A. Kerr, *on the brief*) Hughes Hubbard & Reed LLP, New York, N.Y. (Daniel L. Schwartz,

Day, Berry & Howard LLP, Stamford, Conn., *on the brief*), *for Plaintiffs-Appellants*.

JOSEPH RUBIN, Associate Attorney General, *for* Richard Blumenthal, Attorney General of Connecticut (William J. Prensky, Assistant Attorney General, *on the brief*), Hartford, Conn., *for Defendants-Appellees*.

C. JOAN PARKER, Connecticut Commission on Human Rights & Opportunities, Office of Commission Counsel, Hartford, Conn., *for Intervenor-Defendant-Appellee*.

Jennifer L. Levi, Gay & Lesbian Advocates & Defenders, Boston, Mass.; Maureen M. Murphy, Murphy, Murphy, Ferrara & Nugent, LLC, New Haven, Conn., *for Movants*.

Peter Ferrara, American Civil Rights Union, McLean, Va., *for Amicus Curiae* American Civil Rights Union, in support of Plaintiffs-Appellants.

John H. Findley, Harold E. Johnson, Pacific Legal Foundation, Sacramento, Cal., *for Amicus Curiae* Pacific Legal Foundation, in support of Plaintiffs-Appellants.

Jamie L. Mills, Hartford, Conn., *for Amicus Curiae* Connecticut Voices for Children, Connecticut Parents, Families and Friends of Lesbians and Gays, Inc., Connecticut Sexual Assault Crisis Services, Inc., Gay Lesbian and Straight Educa-

tion Network, Hartford Gay and Lesbian Health Collective, Institute for Community Research, and True Colors, Inc., in support of Defendants-Appellees and Intervenor-Defendant-Appellee.

CALABRESI, *Circuit Judge*:

In May 2000, the Connecticut State Employee Campaign Committee denied the application of the Connecticut Rivers Council, a local chapter of the Boy Scouts of America, to participate in the state's workplace charitable contribution campaign. That decision was based on a ruling by the Connecticut Commission on Human Rights and Opportunities that the Boy Scouts of America's policy of excluding homosexuals from membership and employment positions meant that the local chapter's participation in the campaign would contravene state law. The Boy Scouts brought suit for violations of their First Amendment right of expressive association, *see Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and of Connecticut State law. The United States District Court for the District of Connecticut (Eginton, *J.*) granted the defendants' motion for summary judgment. We hold that the removal of the Boy Scouts from this nonpublic forum did not violate the Boy Scouts' First Amendment right to expressive association. We also hold that there was no violation of Connecticut law. Accordingly, we affirm the judgment of the district court.

BACKGROUND

The Connecticut legislature has established an annual workplace charitable campaign (the "Campaign") to "raise funds from state employees for charitable and public health, welfare, environmental, conservation and service purposes." Conn. Gen. Stat. § 5-262. The Campaign is conducted from September to November each year. State employees make voluntary contributions to charities selected from a list of participating organizations set forth in a booklet that is distributed at the workplace. Gifts are made by payroll deduction. The amount deducted is collected by the Comptroller and transmitted to a principal combined fund-raising organization, usually a United Way, that administers the Campaign for the state.

The Campaign is governed by a State Employee Campaign Committee (the "Committee") whose voting members include: the Comptroller or her designee, the Commissioner of Administrative Services or his designee, the executive director of the Joint Committee on Legislative Management or his designee, ten state employees and two retired state employees. Conn. Gen. Stat. § 5-262(b). Committee members who are current state employees continue to be paid their state salaries while they work on the Campaign during normal business hours. Similarly, state agencies are encouraged to loan employees to the Committee to work on the Campaign. Conn. Agencies Regs. § 5-262-2(d). But the State does not contribute to the Committee's budget or fund the operations of the Campaign. Operating costs are furnished by the participating charities.

Member organizations participate through federations. A member organization files its Campaign application with its parent federation, which maintains the applica-

tion. The parent federation then files an annual application with the Committee attesting to its member organizations' compliance with all of the Committee's requirements. The application requires, inter alia:

> a document signed by an officer or the executive director of a federation, certifying . . . that the federation maintains on file the following documents for itself and for each member agency . . . . (vii) a written policy of non-discrimination.

Conn. Agencies Regs. § 5-262-4(a)(4). The Committee, acting through a subcommittee, reviews all applications for completeness and for compliance with eligibility standards. The Committee's regulations also provide for the removal of a federation or one of its member organizations from a campaign if that federation or member organization fails to adhere to the eligibility requirements or the policies and procedures of the Campaign. Conn. Agencies Regs. § 5-262-5(a). If a member organization's eligibility to participate in the Campaign is withdrawn by the Committee, the federation may not distribute any funds raised in the Campaign to that organization. Conn. Agencies Regs. § 5-262-5(c).

The Connecticut Rivers Council, Boy Scouts of America, is a private, nonprofit organization chartered by the Boy Scouts of America to support scouting in the Connecticut counties of Litchfield, Hartford, Windham, New London, and Middlesex. (The Connecticut Rivers Council and Boy Scouts of America have submitted a joint brief to this court and will be referred to collectively as the "BSA.") The Connecticut Rivers Council and three other Connecticut councils are member agencies of local chapters of the United Way. The BSA has participated in the Campaign for 30 years. In its applications, the BSA affirmatively answered that it had a written policy of

nondiscrimination. In 1999, some state employees earmarked their Campaign donations for the BSA and, upon application to its local United Way, the BSA received corresponding disbursements.

The Connecticut Commission on Human Rights and Opportunities ("CHRO") is the independent state agency that is "charged with the primary responsibility of determining whether discriminatory practices have occurred and what the appropriate remedy for such discrimination must be." *Dep't of Health Servs. v. Comm'n on Human Rights & Opportunities ex rel. Mason*, 503 A.2d 1151, 1156 (Conn. 1986).

On October 6, 1999, Cynthia Watts Elder, the Executive Director of the CHRO, wrote an unsolicited memorandum to the Committee indicating her concern that, by allowing the BSA to participate in the Campaign and to benefit from a fundraiser that used state resources, the Committee potentially made the state a party to discrimination in violation of Connecticut's Gay Rights Law, Conn. Gen. Stat. §§ 46a-81a-46a-81r. The impetus for the letter was the New Jersey Supreme Court's decision in *Dale v. Boy Scouts of America*, 734 A.2d 1196 (N.J. 1999), which, as described by Watts Elder in her memorandum, had "decided that it is discriminatory for the Boy Scouts of America to expel an Assistant Scoutmaster who publicly declared that he was gay."

In reaction to the October 6, 1999 letter from the CHRO, the Committee sought an immediate clarification from the BSA. On October 12, 1999, Harry Pokorny, Scout Executive of the Connecticut Rivers Council, sent a letter in response that expressed the BSA's national position on homosexuality, which was that "[i]f an individual does indicate that they are homosexual we can not register them." In the BSA's Local Rule 9(c)(2) State-

ment in Response to Defendant-Intervenor's Local Rule 9(c)(1) Statement, the BSA stated its policy as follows:

> In the exercise of its constitutional rights, Boy Scouts does not employ known or avowed homosexuals as commissioned professional Scouters or in other capacities in which such employment would interfere with Scouting's mission of transmitting values to youth. However, other jobs within Scouting are open to known or avowed homosexuals. . . . . In the exercise of its constitutional rights, Boy Scouts does not register known or avowed homosexuals as adult volunteer leaders or youth members.

The Boy Scouts of America's position on sexual orientation was memorialized in its writings as long as twelve years ago. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 651-53 (2000).

Because of the apparent conflict between the BSA's certification that it had a nondiscrimination policy and the October letter explaining the Boy Scouts' national position on homosexuality, the Committee, on November 19, 1999, petitioned the CHRO for a declaratory ruling on two questions:

1. Does the BSA's and/or its local councils' policy or policies on sexual orientation violate any state anti-discrimination statute or regulation over which your agency has any oversight or jurisdiction?

2. Is the Committee's inclusion of BSA member agencies in the State Employee Campaign in violation of any state law over which your agency has oversight or jurisdiction, including but not limited to Conn. Gen. Stat. Sections 46a-81d, 46a-81l and 46a-81n?

The CHRO sought and received information from the Committee, the BSA and other interested parties in the course of the declaratory rulings proceedings. On April 27, 2000, the CHRO conducted a fact-finding hearing to assist it in rendering its decision. The CHRO issued its first declaratory ruling on May 12, 2000, in which, answering the second question, it concluded that if the Committee were to retain the BSA in the Campaign, the state would be in violation of those sections of Connecticut's Gay Rights Law that the Committee had listed in its petition. The May 12, 2000 ruling did not answer the Committee's first question.

In accordance with the CHRO's ruling, the Committee on May 15, 2000, notified the various United Way federations that their member Boy Scout Councils would not be able to participate in the upcoming Year 2000 Campaign.

On June 7, 2000, the BSA filed a complaint in the United States District Court for the District of Connecticut charging violations of (1) 42 U.S.C. § 1983, for infringements of its First Amendment rights; (2) the state regulations governing participation in the Campaign, Conn. Agencies Regs. § 5-262-3(k); (3) a state statute, which the BSA characterized as prohibiting the State from promoting homosexuality in educational institutions, Conn. Gen. Stat. § 46a-81r; and (4) a state statute prohibiting the State from discriminating against persons having a preference for heterosexuality, Conn. Gen. Stat. § 46a-81a.

On June 26, 2000, the Supreme Court handed down a decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), which held that New Jersey's application of its anti-discrimination law to compel the Boy Scouts to accept a homosexual gay activist as an assistant scoutmaster violated the Boy Scouts' First Amendment right

to expressive association. The Committee held a meeting on July 7 to discuss its course of action in light of *Dale*. On the same day, the Committee filed a "Request for Clarification" with the CHRO asking:

> What is the effect of the United States Supreme Court decision in *Boy Scouts of America v. Dale*, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000) on the CHRO's declaratory ruling dated May 12, 2000 and issued to the [Committee]?

On July 31, the Committee excluded 29 organizations from the Campaign for failing to certify their acceptance of a revised non-discrimination policy.

On November 15, 2000, the CHRO issued a declaratory ruling answering the first question posed in the Committee's November 19, 1999 petition (the question it had left unanswered in its May 12, 2000 ruling). It held (1) that the BSA's policy of excluding gay employees was covered by Connecticut's anti-discrimination statutes, but that violations would have to be determined on a case-by-case basis in light of whether the employment position was a leadership one; (2) that under the Supreme Court's decision in *Dale*, Connecticut could not prevent the BSA from excluding openly gay men and/or avowed homosexuals as adult leaders; and (3) that it was not prepared to rule on the legality of the BSA's exclusion of gay youths from membership.

Subsequently, on February 8, 2001, the CHRO issued a ruling on the Committee's July 7, 2000 petition. In this decision, it concluded that *Dale* did not substantively impact the CHRO's declaratory ruling of May 12, 2000.

On February 28, 2001, the CHRO moved to intervene as a defendant in the district court case that the BSA had initiated. The CHRO's stated interest was "to ensure that state facilities not be used in furtherance of discrimi-

nation and that State employees not be subjected to solicitation on behalf of discriminating organizations, and that its Declaratory Rulings have the full force and effect of the law." The district court granted that motion.

After completing discovery, the BSA, the Commission and the CHRO all filed motions for summary judgment. On July 22, 2002, the district court granted summary judgment to the defendants on all of the BSA's claims. *Boy Scouts of Am. v. Wyman*, 213 F. Supp. 2d 159 (D. Conn. 2002).

In reaching its conclusion that there was no First Amendment violation, the court relied on *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985), which held that a law excluding legal defense and advocacy organizations from a similar federal workplace charitable campaign would be permissible under the First Amendment if the exclusion was (1) viewpoint neutral and (2) reasonable. *Id.* at 806-09. The district court expressly rejected the BSA's claim that because other non-excluded participants in the Campaign (e.g., Parents, Families, & Friends of Lesbians and Gays) discriminated in the provision of services, its anti-homosexual message was singled out for different treatment. It based this holding on its finding that the BSA had presented no evidence that non-excluded organizations discriminated in their membership or employment practices, as did the BSA. *Wyman*, 213 F. Supp. 2d at 166-68.

The district court also held that the CHRO's reading of Connecticut law was correct.[1] It found that there was no violation of Connecticut Agency Regulations § 5-262-3(k) because on November 15, 2000, the CHRO had cor-

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[1] The district court's consideration of the claims arising under Connecticut law was based upon supplemental jurisdiction. 28 U.S.C. § 1367(a).

rectly ruled that the BSA was in violation of Connecticut's Gay Rights law. *Id.* at 169. It determined that there was no violation of the statutory provision that the BSA claimed to bar the promotion of homosexuality in educational institutions, Conn. Gen. Stat. § 46a-81r, because the BSA was not an educational institution and the Committee's actions could not be construed as a state action condoning homosexuality. *Id.* at 169-70. Finally, the district court rejected the BSA's claim that its exclusion from the Campaign violated Connecticut's law prohibiting discrimination against persons having a preference for heterosexuality, Conn. Gen. Stat. § 46a-81a, on the basis of the court's prior conclusion that the exclusion of the BSA from the Campaign was viewpoint neutral. *Id.* at 170.

The BSA appeals the district court's grant of summary judgment in its entirety, arguing that the Committee violated both the First Amendment and Connecticut State law when it terminated the BSA's participation in the Campaign.

DISCUSSION

We review the district court's rulings on the motions for summary judgment de novo, examining the evidence in the light most favorable to, and drawing all inferences in favor of, the BSA. *Hotel Employees & Rest. Employees Union, Local 100 v. City of New York Dep't of Parks & Recreation*, 311 F.3d 534, 543 (2d Cir. 2002). Summary judgment is appropriate only when there is no genuine issue as to any material fact. *Id.* "Where cross-motions for summary judgment are filed, a court must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences

against the party whose motion is under consideration." *Id.* (internal quotation marks omitted).

I. The First Amendment

The BSA argues that Connecticut has violated its First Amendment right of expressive association, a right that the Supreme Court recognized in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). *Dale* held that New Jersey's attempt to require that the Boy Scouts admit a homosexual gay activist as a scout leader unconstitutionally infringed on the Boy Scouts' First Amendment right to expressive association. The BSA argues that by conditioning its participation in the Campaign on a change in its membership policies, the defendants violated the BSA's constitutional right to expressive association.

In order to prevail, the BSA must establish two propositions. First, it must show that it was excluded from the Campaign because of acts protected by the First Amendment. The defendants argue that the decision to exclude the BSA from the Campaign was based on BSA employment and membership policies that are not protected by the First Amendment even after *Dale*. Second, assuming that the BSA's removal from the Campaign was a consequence of the BSA's exercise of its First Amendment right to expressive association, the BSA must establish that that removal violated the Constitution. That is, if the BSA's removal from the Campaign was the result of the BSA's exercise of its First Amendment rights, then in order to show a constitutional violation under governing law, the BSA must demonstrate that the Committee's decision to exclude it from the Campaign was either unreasonable or viewpoint discriminatory. We consider each of these issues in turn.

A. The Scope of the BSA's First Amendment Right to Expressive Association

The parties differ on how *Dale* should be read. In particular, they disagree, first, as to whether *Dale* held that the Boy Scouts has a First Amendment right to exclude all avowed homosexuals, or only homosexuals who publicly voice a viewpoint that is contrary to the Boy Scouts' position on homosexuality, and, second, as to whether under *Dale* the Boy Scouts has a right to exclude homosexuals (whether gay activists or not) from all membership or employment positions, or only from those leadership positions through which the Boy Scouts expresses its message. The BSA and its amici argue for the broader interpretation, under which the BSA may exclude any homosexual from any position. The defendants and their amici argue for the narrower reading, according to which *Dale* held only that the Boy Scouts has a First Amendment right to exclude (a) gay activists from (b) leadership positions.[2]

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[2] Other courts to consider these issues have come to various conclusions. At least two decisions have suggested that a homosexual's public activism is relevant to the question of whether the Boy Scouts may exclude him. *Boy Scouts of Am. v. D.C. Comm'n on Human Rights*, 809 A.2d 1192, 1201-03 (D.C. 2002) (holding that the *Dale* court "meant something of legal significance by coupling 'avowed homosexual' with — or distinguishing it from — 'gay activist' " and, before holding that the Boy Scouts could not be required to grant the complainants membership, finding that they were at least as "activist" as Dale); *Chicago Area Council of Boy Scouts of Am. v. City of Chicago Comm'n on Human Relations*, 748 N.E. 2d 759, 767 (Ill. App. Ct. 2001) (emphasizing that "[l]ike the complainant in *Dale*," the complainant in that case had publicly identified himself as a regional spokesperson for a gay rights organization). The Appellate Court of Illinois also adopted the narrow interpretation on the question of whether *Dale* applies to all membership and employment decisions or only to decisions about lead-

The CHRO advances the following argument for its narrow reading of *Dale*. *Dale* states that some deference is due to an organization's assertions, first, as to what message it intends to express and, second, with respect to whether allowing a member of a given group to occupy a specified position in the organization would impair that message. *Dale*, 530 U.S. at 651-53. But as to the second question — the effect of a certain individual occupying a given position within the organization — *Dale* cautions that this "is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message." *Id.* at 653. And the *Dale* opinion goes on to examine closely (and ultimately to agree with) the Boy Scouts' position that allowing Dale to occupy a leadership position would impair its expressive association. *Id.* at 653-56. Consequently, the CHRO maintains, *Dale* requires that courts engage in an independent evaluation of whether the inclusion of a given individual in a specific position will infringe on an organization's right to expressive association.[3]

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ership positions. *Chicago Area Council*, 748 N.E. 2d at 768-69 (remanding for determination of whether the Boy Scouts' "policies discriminated against [the complainant] based on his sexual orientation regarding nonexpressive positions that do not abridge *Dale*"). A Florida district court, however, seems to have adopted the broader reading of *Dale* on both counts. *Boy Scouts of Am., S. Fla. Council v. Till*, 136 F. Supp. 2d 1295, 1308 (S.D. Fla. 2001) (suggesting that the required inclusion of any homosexual, whether an activist or not, implicated the Boy Scouts expressive-associational rights under *Dale*).

[3] While there is no obvious objective test for *what* message an organization intends to convey — a fact that recommends a certain amount of deference to the organization's statements on the matter — the CHRO argues that courts regularly tackle questions of the second sort — i.e., questions analogous to the issue of what effect on the Boy

Moreover, the CHRO argues, in scrutinizing the Boy Scouts' claim that admitting Dale as an adult leader would compromise its expressive association, *Dale* relied heavily on *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995). *See Dale*, 130 U.S. at 653-54, 659. *Hurley* held that the organizers of the Boston St. Patrick's Day Parade had a First Amendment right to exclude a group of gay, lesbian and bisexual decedents of Irish immigrants, which went by the acronym "GLIB," from the parade.

In explaining the outcome of *Hurley*, *Dale* emphasizes that "parade organizers did not wish to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner." *Id.* at 653. This, *Hurley* held, would have interfered with the organizers' "choice . . . not to propound a particular point of view, [which] is presumed to lie beyond the government's power to control." *Id.* at 654 (quoting *Hurley*, 515 U.S. at 575). *Dale* also suggests that the First Amendment harm at issue in *Dale* was similar to the harm at stake in *Hurley*. *Id.* at 654 ("As the presence of GLIB in Boston's St. Patrick's Day parade would have interfered with the parade organizers' choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scout's [sic] choice not to propound a

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Scouts' message allowing a gay activist to occupy a leadership position within that organization would have. *See, e.g., Hsu By ex rel. Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839 (2d Cir.) (examining the positions in a student Christian organization from which non-Christians were excluded and concluding that it would adversely impact the organization's expression to require it to allow non-Christians to hold the offices of President, Vice-President and Music Coordinator, but not those of Activities Coordinator or Secretary, despite the complainants' assertion that a non-Christian in any leadership position would undermine the religious meaning of the meetings).

point of view contrary to its beliefs."). It follows, the CHRO argues, that only homosexuals who hold up a "banner" — i.e., who proclaim a message contrary to that of the Boy Scouts — and who occupy expressive positions within the organization — positions, that is, in which that "banner" is on display — threaten the Boy Scouts' protected First Amendment interests. Only *their* participation would compel the Boy Scouts to associate with a message that it finds objectionable.

The CHRO urges that, on this narrow reading of *Dale*, the exclusion of the BSA from the Campaign raises no constitutional issues at all. The Committee's decision to remove the BSA, the CHRO asserts, was based not on the BSA's exercise of a constitutionally protected right — its right to exclude gay activists from leadership positions — but on the BSA's stated policy of excluding all known or avowed homosexuals from non-leadership positions. That being the case, according to the CHRO, the BSA's participation in the Campaign was not conditioned on its relinquishing its First Amendment rights and, therefore, is not cause for constitutional concern.

While the district court granted the defendants summary judgment on a different basis, we may affirm the judgment of the district court on any ground appearing in the record. *Konikoff v. Prudential Ins. Co. of Am.*, 234 F.3d 92, 98 (2d Cir. 2000). We therefore can consider the CHRO's argument. On the record before us, however, the CHRO's approach cannot support summary judgment for the defendants. The CHRO's reasons for adopting the narrow reading of *Dale* are not without some merit. But that interpretation — even if accepted — would only justify summary judgment for the defendants if, making all inferences in favor of the BSA, we concluded that the decision to remove the BSA from the Campaign was in no way based on the BSA's exclusion of gay activists

from leadership positions. And this the record before us does not clearly demonstrate.

The CHRO's own May 12, 2000 Declaratory Ruling, which held that the BSA's participation in the Campaign violated Connecticut's Gay Rights Law and which was the sole basis for the Committee's decision to remove the BSA from the Campaign, spoke of "the BSA's policy of excluding homosexuals from participation." CHRO Decl. Ruling of May 12, 2000, at 5, 12. It did not distinguish between leaders and non-leaders or between activists and non-activists.[4] It is true that the CHRO's February 8, 2001 Declaratory Ruling, which evaluated the effect of *Dale* on the May 12, 2000 decision, arguably makes such distinctions, but it does not do so beyond peradventure. CHRO Decl. Ruling of Feb. 8, 2001, at 11. We are required in this appeal to draw all reasonable inferences in favor of the BSA. *Hotel Employees*, 311 F.3d at 543. And, on the record as a whole, we are unable to say with sufficient certainty that the decision to remove the BSA from the Campaign was not based in part on the BSA's exclusion of gay activists from leadership positions, a practice of the BSA that, under any reading of *Dale*, is constitutionally protected.

Consequently, given the procedural posture of this case, we must assume that the removal of the BSA from the Campaign was triggered at least to some extent by the BSA's exercise of what the Supreme Court has held to be a constitutionally protected right. The question,

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[4] The CHRO's November 15, 2000 Declaratory Ruling went no further. It did not find that the BSA actually excluded homosexuals from non-leadership employment positions. Nor did it clearly rule on the question of whether the BSA's exclusion of avowed homosexuals as adult volunteer leaders violated Connecticut law. And it expressly did not reach the issue of whether the exclusion of youth members violated Connecticut law. CHRO Decl. Ruling of Nov. 15, 2000, at 7-10.

then, is whether that removal in these circumstances violated the Constitution.

B. The Test for Constitutionality

While *Dale*'s recognition of the Boy Scouts' expressive-associational right to exclude a gay activist from a leadership position sets the stage for the issues in this case, it does not determine their resolution. *Dale* considered New Jersey's attempt *to require* the Boy Scouts to admit a person who, the Supreme Court found, would compromise the Boy Scouts' message. Not surprisingly, the Supreme Court held that such state compulsion "directly and immediately affects . . . associational rights that enjoy First Amendment protection" and imposes a "serious burden" on them. 530 U.S. at 658-59. The effect of Connecticut's removal of the BSA from the Campaign is neither direct nor immediate, since its conditioned exclusion does not rise to the level of compulsion. Consequently, *Dale* does not, by itself, mandate a result in the current case.

Rather, this case appears to be governed by two lines of First Amendment cases. The first deals with nonpublic forums and is exemplified by *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985), which considered the federal government's attempt to exclude legal defense and advocacy groups from a federal workplace charitable campaign. *Cornelius* held that the federal charitable campaign was a nonpublic forum and concluded that access to the campaign "can be restricted as long as the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* at 800 (internal punctuation omitted).

The second relevant line of cases is often described as the doctrine of unconstitutional conditions, which holds that the government may not condition certain government benefits on the relinquishment of constitutional rights. Like the nonpublic forum cases, this doctrine permits some, but not all, restrictions on speech and associational rights. Thus, for instance, in *Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983), the Supreme Court upheld a prohibition on substantial lobbying by 501(c)(3) charitable organizations. So long as the government did not discriminate invidiously in such a way as to "aim[ ] at the suppression of dangerous ideas," all that was required, the Court held, was that the exemption be rational. *Id.* at 548, 550 (internal punctuation and quotation marks omitted). *See also NEA v. Finley*, 524 U.S. 569, 587 (1998) ("If the NEA were to leverage its power to award subsidies on the basis of subjective criteria into a penalty on disfavored viewpoints, then we would confront a different case. We have stated that, even in the provision of subsidies, the Government may not 'ai[m] at the suppression of dangerous ideas.' " (quoting *Regan*, 461 U.S. at 550) (alternation in original)).

The case before us lies at the intersection of these two lines of authority and it makes no difference under which line we analyze it. Whether viewed as denial of access to a nonpublic forum or as the denial of a government benefit, the BSA's exclusion is constitutional if and only if it was (1) viewpoint neutral and (2) reasonable.[5] *Cornelius*,

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[5] The author of this opinion, speaking for himself alone, adds the following comments.

In the CHRO's February 8, 2001 decision that considered the effects of *Dale* on its earlier ruling that the BSA's participation in the Campaign violated Connecticut law, the CHRO concluded that Connecticut's compelling interest in the enforcement of its antidiscrimi-

473 U.S. at 800; *Regan*, 461 U.S. at 550. Consequently, we need not classify this case under one heading or another, but have the benefit of viewing it stereoscopically.

1. Viewpoint Neutrality

We begin with the more fundamental question, which is whether the removal of the BSA from the Campaign

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nation statutes justified the limited burden that exclusion from the Campaign placed on the BSA's expressive association. CHRO Decl. Ruling of Feb. 8, 2001, at 16-18. It is possible that, under the Fourteenth Amendment, a *state* that has adopted a policy of equal protection with respect to a specific group may have a compelling interest in the enforcement of that policy, even if the *federal* government has not recognized that same group's claim to heightened scrutiny for the purposes of equal protection. *Dale* held that New Jersey's interest in enforcing its antidiscrimination laws was insufficient to justify that state's attempt to prohibit the BSA from engaging in the BSA's chosen form of expressive association. But that does not mean that, as to other state actions that are significantly less restrictive of associational freedoms, there might not be a state interest compelling enough to justify the restrictions. *See Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) ("Infringements on [the freedom of association] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."); *cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (holding that the governmental interest in eradicating racial discrimination was sufficiently compelling to justify withholding tax exempt status from a university on the basis of its religiously motivated racially discriminatory policies, despite the harm to the university's right to free exercise of religion). The defendants, however, do not press these arguments on appeal and we, therefore, need consider them no further.

That said, the author of this opinion — perhaps because he is skeptical of, though bound to follow, the distinction between differential adverse impact and motive that has been made by the Supreme Court cases cited infra — sees in this unmade argument a potentially more convincing way to uphold limited state restrictions of the sort involved in this case.

was viewpoint discriminatory. The BSA and its amici essentially raise two challenges under the heading of viewpoint discrimination. The first is that Connecticut's Gay Rights Law is viewpoint discriminatory on its face. The second is that the defendants applied the law to the BSA in a viewpoint discriminatory manner.

a) Is Connecticut's Gay Rights Law in itself viewpoint discriminatory?

On its face, Connecticut's Gay Rights Law prohibits discriminatory membership and employment policies not because of the viewpoints such policies express, but because of the immediate harms — like the denial of concrete economic and social benefits — such discrimination causes homosexuals. That is, as written, Connecticut's Gay Rights Law regulates membership and employment policies as conduct, not as expression and, as such, is not obviously viewpoint discriminatory.

Both the nonpublic-forum and the unconstitutional-conditions cases hold, however, that it is not enough that a law appear viewpoint-neutral on its face. A reviewing court must also determine that the rule is not a facade for viewpoint discrimination. *See Cornelius*, 473 U.S. at 811-13 (holding that "[t]he existence of reasonable grounds for limiting access to a nonpublic forum, however, will not save a regulation that is in reality a facade for viewpoint-based discrimination," and remanding for determination of "whether the exclusion of respondents was impermissibly motivated by a desire to suppress a particular point of view"); *Regan*, 461 U.S. at 548 (emphasizing that there is "no indication that the statute was intended to suppress any ideas or any demonstration that it has had that effect").

The BSA and its amici argue, and we agree, that Connecticut's Gay Rights Law has a differential adverse impact[6] on attempts to voice anti-homosexual viewpoints through the medium of expressive association. As a general matter, all anti-discrimination laws that govern organizations' membership or employment policies have a differential and adverse impact on those groups that desire to express through their membership or employment policies viewpoints that favor discrimination against protected groups. A law that penalizes race-based discrimination in membership or employment will almost inevitably have a particularly adverse impact on the expression of doctrines like that of racial superiority to the extent that these doctrines are sought to be stated and spread through membership or employment practices. Similarly, and for the same reason, Connecticut's Gay Rights Law has a foreseeably adverse impact on the expressive abilities of organizations that seek through their membership and employment policies to voice their view that homosexuality is immoral. Since the medium is, in part, the message, any regulation of the medium will to some extent restrict the message.

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[6] We use the term "differential" to distinguish a law against littering, which has an adverse impact on speech but would not seem to affect one viewpoint over another, from a situation like the one before us in which the regulation, though aimed at conduct and not directed at a particular viewpoint, does have a predictably greater impact on some viewpoints rather than others. The impact could be termed "disparate," but we hesitate to use that word, as we do not wish to take a position one way or another on whether the treatment of "disparate impact" in other areas of the law, *compare, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (establishing disparate impact as a theory of liability under Title VII) *with Washington v. Davis*, 426 U.S. 229 (1976) (holding that discriminatory purpose rather than disparate impact is the touchstone of an Equal Protection violation), have direct application here.

Such a differential adverse impact upon a given viewpoint may suffice to trigger constitutional scrutiny. But viewpoint disparity, standing alone, does not constitute proof of viewpoint discrimination. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992) ("We have long held, for example, that nonverbal expressive activity can be banned because of the action it entails, but not because of the ideas it expresses — so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not." (citing cases)); *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 763 (1994) ("[T]he fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based."); *cf. Bob Jones Univ.*, 461 U.S. at 604 n.30 ("[A] regulation does not violate the Establishment Clause merely because it happens to coincide or harmonize with the tenets of some or all religions." (internal quotation marks omitted)).

Where a law is on its face viewpoint neutral (e.g., when it applies to conduct that is not primarily expressive) but has a differential impact among viewpoints, the inquiry into whether the law is in fact viewpoint discriminatory turns on the law's purpose. Such a law is viewpoint discriminatory only if its purpose is to impose a differential adverse impact upon a viewpoint. *See R.A.V.*, 505 U.S. at 390 ("Where the government does not *target* conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy." (emphasis added)); *Madsen*, 512 U.S. at 762-63 (holding that an injunction against anti-abortion protesters was not viewpoint discriminatory because "none of the restrictions imposed by the court were *directed* at the contents of petitioner's message." (emphasis added)); *id.*

at 763 ("We thus look to the government's *purpose* as the threshold consideration." (emphasis added)).

The BSA makes no argument that the purpose of Connecticut's Gay Rights Law was to impose a price on the expression of its point of view, rather than to protect persons from the more immediate economic and social harms of discrimination. Instead, its briefs to this court, as well as the briefs of its amici, simply assume that a law that has a differential adverse impact upon a viewpoint is necessarily viewpoint discriminatory.[7] The Supreme Court, however, in the cases just cited, has made clear that such inferences — from differential impact to motive, and thence to viewpoint discrimination — are not automatically to be drawn.

The Connecticut Supreme Court has stated that "[t]he Gay Rights Law was enacted in order to protect people from pervasive and invidious discrimination on the basis of sexual orientation." *Gay & Lesbian Law Students Ass'n v. Bd. of Trs.*, 673 A.2d at 498; *see also id.* at 503 (Berdon, *J.*, concurring) ("Gay men and lesbians have a right to be free from the discrimination and degrading

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[7] *See, e.g.*, Appellant Br., at 36 ("After *Dale*, there can be no question that Boy Scouts' policy denying leadership to open homosexuals is part of Boy Scouts' expression and cannot be interfered with by state non-discrimination laws. To exclude Boy Scouts is viewpoint discrimination as a matter of law."); Amicus Br. of the American Civil Rights Union, at 12 ("Connecticut . . . excluded the Boy Scouts from the . . . Campaign . . . precisely because of the exercise by the Boy Scouts of the exact constitutional rights upheld by the U.S. Supreme Court in *Dale*. Consequently, the state has undeniably penalized the Boy Scouts for exercising these precise Constitutional rights." (footnote omitted)); Amicus Br. of the Pacific Legal Foundation, at 7 ("Connecticut has very clearly *discriminated* against the Boy Scouts 'on the basis of viewpoint' by excluding them from a fund raising program available to other organizations with more acceptable viewpoints." (emphasis in the original)).

homophobia that is prevalent in our society. [In passing the Gay Rights Law, the] legislature has adopted this public policy . . . ."). We can find no reason to doubt the Connecticut Supreme Court's view of the matter and conclude that the purpose of Connecticut's Gay Rights Law is to discourage harmful conduct and not to suppress expressive association. We therefore hold that the law as enacted is viewpoint neutral.[8]

b) Was the defendants' application of Connecticut's Gay Rights Law viewpoint discriminatory?

While the BSA does not contend that the Connecticut legislature's purpose was to suppress expression, as such, when it enacted the Gay Rights Law, it does argue that in applying that law, the defendants singled the BSA out on the basis of its viewpoint. If the defendants in fact applied the Gay Rights Law in a viewpoint discriminatory manner, then the BSA would have a legitimate constitutional complaint. *See Cornelius*, 473 U.S. at 812 (noting that the inconsistent application of a viewpoint-neutral law might be evidence of impermissible viewpoint discrimination); *Finley*, 524 U.S. at 587 (suggesting that an as-applied challenge would lie where, in a particular funding decision, "the denial of a grant may be shown to be the product of invidious view-

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[8] We recognize that the legislature's viewpoint-neutral purpose in passing a law that has a predictably adverse impact on certain viewpoints may be cold comfort to those whose expression the law, in practice, limits. But that is precisely the result that follows from the Supreme Court's treating more restrictive measures, like those considered in *Dale*, differently from the lesser harm of removal from a nonpublic forum, like that at stake in the instant case. Connecticut has not prevented the BSA from exercising its First Amendment rights; it has instead set up a regulatory scheme to achieve constitutionally valid ends under which, as it happens, the BSA pays a price for doing so.

point discrimination").[9] The BSA makes two assertions in support of its claim that the defendants applied the Gay Rights Law in a viewpoint discriminatory manner.

First, the BSA argues that the procedures used to exclude it from the Campaign were irregular in a way that indicates that it was singled out for disfavored treatment. The BSA alleges that the following facts constitute evidence that it was improperly targeted: (1) the inquiry into the matter was initiated not by the Committee, but by the head of the CHRO; (2) the hearing on the matter was fast tracked, which the BSA reads as evidence that the CHRO wanted to reach a decision before the Supreme Court's ruling in *Dale*; (3) the April 27, 2000 hearing was "stacked" by inviting only groups opposed to the BSA's policies; (4) the CHRO's counsel consulted with the Gay & Lesbian Advocates & Defenders in framing both its May 12, 2000 and its February 8, 2001 rulings, while the BSA had no input; and (5) the Committee and the CHRO ignored pro-BSA precedent in framing the issue and in reaching their decision.

Second, the BSA argues that other organizations that served people of a particular sex, age, ethnicity, race and even sexual orientation were neither investigated nor excluded from the Campaign. From this, it draws the inference that it was targeted for its anti-homosexual message.[10]

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[9] The CHRO argues that under *Cornelius* the only issue is "whether the regulation itself — not its application to a particular party — was a 'facade' for viewpoint-based discrimination." CHRO Brief at 34. We decline to adopt so narrow a reading either of the non-public-forum or of the unconstitutional-conditions cases, and believe that the application of a viewpoint neutral rule in a viewpoint discriminatory manner violates the First Amendment.

[10] The BSA lists the following organizations that, it claims, "serve preferentially or exclusively persons of a particular race, color,

The district court correctly held that the BSA's evidence of discrimination by the Committee and the CHRO is insufficient to survive summary judgment. The BSA's claims of biased procedure are purely speculative. The initiation of the inquiry by the head of the CHRO and the CHRO's contacts with anti-discrimination groups are evidence not of viewpoint discrimination, but of the CHRO's dual statutory role as both advocate and adjudicator. *See Dep't of Health Servs. v. Comm'n on Human Rights and Opportunities ex rel. Mason*, 503 A.2d 1151, 1156 (Conn. 1986). The BSA has adduced no evidence that the hearing was fast-tracked because the defendants wanted to reach a decision before the Supreme Court issued a ruling in *Dale* — a ruling whose legal effect would not, in any event, depend on when the CHRO rendered its own ruling — rather than, as the defendants testified, to reach a decision before the start of the annual Campaign. Finally, the BSA's claim that the CHRO ignored controlling precedent that favored the BSA's position does no more than presume the correctness of the BSA's legal argument.

The BSA's second argument — that other groups that discriminate on bases other than the BSA were not excluded from the Campaign — raises a more serious

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religious creed, sex, age, national origin, or ancestry" and were allowed to participate in the Campaign: the Girl Scout Council of Southwestern Connecticut, Lambda Legal Defense and Education Fund, the Hartford Gay and Lesbian Health Collective, the Stonewall Foundation, Padres Abriendo Puertas, the NAACP Legal Defense and Educational Fund, Casa Boricua de Meriden, the Hispanic Health Council, Inc., Casa Otonal, Nutmeg Big Brothers/Big Sisters, Inc., Boys and Girls Club of Hartford, Inc., United Seniors in Action, Services for the Elderly of Farmington, Inc., Catholics for a Free Choice, the Greater Hartford Jewish Community Center, Inc., the National Black Child Development Institute, and the Hispanic Scholarship Fund. Appellant Br., at 14-15.

issue. Evidence that the defendants, without legitimate reason,[11] discriminated between discriminators — selectively enforcing Connecticut's equal protection law only against anti-homosexual discrimination, and not against, for instance, anti-heterosexual discrimination — if adduced, might well be enough to preclude summary judgment for the defendants. The BSA, however, has presented no evidence that meets this description.

What the BSA gives us is a list of organizations that, by their names, would appear to target their *services* to persons of specific races, ethnicities, sexes, ages or sexual orientations. Despite being given ample opportunity to do so, however, the BSA presents no evidence that these groups actually have policies of discrimination or do discriminate in the provision of services. More significantly, the BSA fails to point to the slightest indication that these groups discriminate in their *membership or employment policies*, as opposed to their policies in providing services.[12] As the district court noted, 213

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[11] A legitimate, viewpoint-neutral reason might include the state's finding that discriminatory conduct against one group was more pernicious, for historical or other reasons, than discriminatory conduct against another group.

[12] At oral argument, the BSA asked that we take judicial notice of the fact that the Girl Scouts of America admits only girls as members. Whether or not this is so, the youth membership policies of organizations whose mission is to serve young people are not comparable to a group's adult membership or employment policies. Such youth membership policies are more like the targeted provision of services. *Cf.* 20 U.S.C. § 1681(a)(6)-(8) (exempting certain youth-membership organizations from the prohibition on gender discrimination in educational programs receiving federal financial assistance). Connecticut seems to have recognized this distinction, for the CHRO declined to rule on whether the BSA's own discriminatory *youth membership* policies violated Connecticut's Gay Rights Law. CHRO Decl. Ruling of Nov. 15, 2000, at 10.

F. Supp. 2d at 168, Connecticut has made a distinction between groups that discriminate in employment and membership policies and groups that discriminate in the provision of services. Connecticut has decided that discrimination of the former sort violates its equal protection law and that discrimination of the latter sort does not. Such a distinction is both reasonable and viewpoint neutral. We conclude that the BSA has presented no evidence that the defendants applied Connecticut's Gay Rights Law in a viewpoint discriminatory manner.

2. Reasonableness

The remaining constitutional question is whether the removal of the BSA from the Campaign was reasonable. The Supreme Court has held that, so long as it is viewpoint neutral, a restriction in a nonpublic forum "need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808 (emphasis in original); *see also Pilsen Neighbors Cmty. Council v. Netsch*, 960 F.2d 676, 686-87 (7th Cir. 1992) (finding the legislative purpose to include only "popular" charities reasonable). The BSA argues, however, that the State of Connecticut's involvement in the Campaign is minimal and that it is "ludicrous" to think that "by permitting charities to participate in the Charitable Campaign, the State is made a party to the policies and actions of the individual charities." Appellant Br. at 37. We take this to be an argument that the BSA's exclusion from the Campaign, based as it was on such an allegedly trivial state interest, was not reasonable.

In its May 12, 2000 ruling, the CHRO concluded that the state was sufficiently involved in the Campaign to trigger the provisions of Connecticut law that prohibit state agencies from supporting organizations that dis-

criminate on the basis of sexual orientation, Conn. Gen. Stat. §§ 46a-81i, 46a-81l, 46a-81n. CHRO Decl. Ruling of May 8, 2000 at 6-8. (In doing so, the CHRO relied in large part on *Gay & Lesbian Law Students Ass'n v. Board of Trustees*, 673 A.2d 484 (Conn. 1996), in which the Connecticut Supreme Court held that the military's use of a state law school's on-campus employment recruiting facilities, of its other employment services and of its office of career services sufficed to trigger the protections of Connecticut's Gay Rights Law.) Given the level of participation of state agencies in the Campaign, we cannot say that the CHRO's interpretation of state law on this matter was unreasonable.[13]

Because the CHRO reasonably concluded that Connecticut's Gay Rights Law in fact required that the BSA be excluded from the Campaign, and given our conclusion that neither that law nor the defendants' reliance on it was a facade for impermissible viewpoint discrimination, it follows that the Committee's actions were a reasonable means of furthering Connecticut's legitimate interest in preventing conduct that discriminates on the basis of sexual orientation. *Cf. Norwood v. Harrison*, 413 U.S. 455, 463 (1973) ("That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination."). And we so hold.

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[13] The CHRO is "charged with the primary responsibility of determining whether discriminatory practices have occurred and what the appropriate remedy for such discrimination must be." *Dept. of Health Servs.*, 503 A.2d at 1156. Under Connecticut law, where, as here, statutes have received some judicial application, "an agency's construction of the statutes entrusted to it for enforcement is generally persuasive, even if it is not dispositive." *Altray Co., Inc. v. Groppo*, 619 A.2d 443, 448 (Conn. 1993); *see also Gay & Lesbian Law Students Assoc. v. Bd. of Trustees*, 673 A.2d 484 (1996) (interpreting Connecticut's Gay Rights Law).

Because the BSA has not presented any evidence of viewpoint discrimination, and because the defendants' removal of the BSA from the Campaign was reasonable, the district court was correct to grant the defendants' motion for summary judgment on the BSA's First Amendment claim.

II. Connecticut State Law

The BSA also maintains that its exclusion from the Campaign violated the Connecticut Agency Regulations that govern the Campaign, as well as various provisions of Connecticut's Gay Rights Law. We consider each of its claims in turn.

The BSA argues that its exclusion violated the regulations governing the Campaign itself, which stipulate that organizations with "a stated policy of nondiscrimination" and "in compliance with all requirements of law and regulations respecting non-discrimination" are eligible to participate in the Campaign. Conn. Agencies Regs. § 5-562-3(k). Given our determination that the CHRO's decision that allowing the BSA to participate in the Campaign would violate Connecticut's Gay Rights Law was a correct and constitutional application of that law, this argument cannot succeed.

The BSA next argues that its exclusion from the Campaign violated a provision of the Gay Rights Law stating that that law shall not be construed "(1) to mean the state of Connecticut condones homosexuality or bisexuality or any equivalent lifestyle, [or] (2) to authorize the promotion of homosexuality or bisexuality in educational institutions or require the teaching in educational institutions of homosexuality or bisexuality as an acceptable lifestyle." Conn. Gen. Stat. § 46a-81r. The BSA argues that by including in the Campaign organizations that

condone homosexual conduct, while excluding the BSA based on its contrary views, the defendants violated this provision. This argument, however, presumes that the BSA was excluded because of its views on homosexuality, rather than its conduct towards homosexuals, a proposition we have already rejected. Nor do we see how the inclusion of gay-rights groups in the Campaign qualifies as "condon[ing] homosexuality or bisexuality," as that term is used in (1).[14] Finally, the BSA can demonstrate neither that it is an "educational institution," as that term is used in (2), nor that it was in any way "required" to teach that homosexuality or bisexuality is an acceptable lifestyle.

Lastly, the BSA claims that the decision not to allow it to participate in the Campaign violates the provisions in the Gay Rights Law that prohibit the state from discriminating on the basis of sexual orientation in its provision of services and benefits, Conn. Gen. Stat. §§ 46a-81i, 46a-81n, where "sexual orientation" is defined to include "having a preference for heterosexuality . . . [or] having a history of such preference or being identified with such preference," Conn. Gen. Stat. § 46a-81a. But the suggestion that the BSA, which is neither a natural person nor an organization devoted to sexual activities, has a sexual orientation is contrary both to the common usage of the term and to the plain meaning of its statutory definition. Moreover, on the BSA's reading of "sexual orientation," any organization that discriminated on the basis of sexual orientation would itself have a sexual orientation and, therefore, its discrimination would be protected by the very laws that

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[14] This is quite apart from whether clause (1) means to *prohibit* anything, or is simply a statement that passage of the Gay Rights Law should not be read as a legislative approval of particular lifestyles.

prohibit such discrimination. This is manifestly not the intended meaning of Connecticut's Gay Rights Law.

CONCLUSION

Having found that the defendants' decision not to allow the BSA to participate in the Campaign violated neither the First Amendment nor Connecticut State law, we AFFIRM the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

3:00cv1047 (WWE)
Decided: July 22, 2002

BOY SCOUTS OF AMERICA, and CONNECTICUT RIVERS COUNCIL, BOY SCOUTS OF AMERICA,

Plaintiffs,

—v.—

NANCY WYMAN, in her capacity as Comptroller of the State of Connecticut and as a member of the Connecticut State Employee Campaign Committee; CAROL CARNEY in her capacity as Chair of the Connecticut State Employee Campaign Committee; and MARGARET DIACHENKO, RICHARD EMONDS, PALUEL FLAGG, CHRISTINE FORTUNATO, BURTON GOLD, CAROL GUILIANO, CAROL HAMILTON, MARILYN KAIKA, JOAN KELLY-COYLE, D'ANN MAZZOCCA, BERNARD MCLOUGHLIN, MICHAEL NICHOLS, WILLIAM PHILIE, CHERYL SAWINA, and NOEL THOMAS in their capacities as members of the Connecticut State Employee Campaign Committee,

Defendants.

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This action arises from a declaratory ruling requested by the Connecticut State Employees Campaign Committee ("Committee"), and issued by the Connecticut Commission on Human Rights and Opportunities ("CHRO"), regarding whether the Committee must permit the Boy Scouts of America, and Connecticut Rivers Council, Boy Scouts of America, collectively a private organization that may legally discriminate on the basis of sexual orientation ("BSA"), the opportunity to participate in the state's workplace charitable campaigns. The CHRO issued its declaratory ruling to the Committee, to the effect that the state would be in violation of Connecticut's Gay Rights Law if the Committee were to retain the BSA in its campaign. The BSA initiated this litigation to enjoin the Committee from excluding it from the Year 2000 Campaign and future campaigns, and to ensure its receipt of state donations already directed to it in the 1999 state campaign.

The BSA alleges that the defendants have violated its rights of freedom of speech and freedom of association protected by the First and Fourteenth Amendments to the United States Constitution, under 42 U.S.C. § 1983 (Count 1); violated its rights under § 5-262-3(k) of the Regulations of Connecticut State Agencies by disallowing the BSA to participate in the Campaign without a decision by the CHRO on whether the Boy Scout membership policies violate a Connecticut anti-discrimination statute (Count 2); violated its rights under Conn. Gen. Stat. § 46a-81r by "condoning homosexuality," and "requiring the teaching in educational institutions of homosexuality as an acceptable lifestyle" (Count 3); and violated its rights under Conn. Gen. Stat. § 46a-81a by

discriminating against the BSA for showing a "preference for heterosexuality," and penalizing the BSA for excluding open homosexuals from leadership positions (Count IV).

Pending before this Court are cross-motions for summary judgement by the BSA; by Nancy Wyman, et al. (collectively referred to as defendant "Committee"); and by the CHRO, as intervenor-defendant. For the reasons set forth below, the Boy Scout's motion for summary judgment will be denied. The motions for summary judgment of the Committee and of the CHRO will be granted.

FACTS

The Connecticut legislature has sanctioned an annual workplace campaign ("Campaign") to raise funds from state employees for charitable and public health, welfare, environmental, conservation, and service purposes. The Campaign is administered by a State Employee Campaign Committee established by law. The Committee members are determined by statute and include: the State Comptroller or her designee; the Commissioner of Administrative Services, or his designee; the Executive Director of the Joint Committee on Legislative Management or his designee; ten state employees; and two retired state employees. The statute also provides for nonvoting members who represent each participating federation in the Campaign. All parties concur that the Committee is a state actor.

The Campaign is a workplace solicitation of state employees that is conducted during working hours using non-coercive methods that permit voluntary giving, and reserve to the individual the right to disclose any gift or to keep it confidential. The Campaign is conducted from September to November each year. Committee members

who are current state employees continue to be paid their state salaries while they work on the Campaign during normal business hours. State employees make their voluntary contributions from the list of participating organizations set forth in the Campaign booklet entitled "Directory of Charitable Organizations" which is distributed at the workplace. The BSA was listed in the Directory for the 1999 and 2000 campaigns.

State employees make their voluntary gifts by payroll deduction. Any state officer or employee wishing to make a voluntary campaign donation must make a written request to the Comptroller to permit a payroll deduction for his or her donation from such officer's or employee's wages or salary. The amount deducted is collected by the Comptroller and transmitted to the principal combined fund-raising organization, usually a United Way, that administers the campaign for the state.

Organizations can participate in the Campaign by submitting an application in the form prescribed by the Comptroller to the Committee on or before January 15 annually. The application requires applicants to provide various specific information to establish eligibility for participation in the campaign. The required Campaign documentation that is particularly relevant to this litigation reads, in pertinent part, as follows:

> a document signed by an officer or the executive director of a federation, certifying . . . that the federation maintains on file the following documents for itself and for each member agency . . . : (vii) a written policy of non-discrimination."

Member organizations of participating federations file their Campaign applications with their parent federations where such applications are thereafter maintained. The parent federation files an application with the Commit-

tee attesting to its member organizations' compliance with all of the Committee's requirements. The Committee, acting through a subcommittee designated as the application review committee, reviews all applications for completeness and for compliance with eligibility standards. The Committee's regulations also provide for the removal of a federation or one of its member agencies from a campaign, if that federation or member agency fails to adhere to the eligibility requirements or the policies and procedures of the Campaign. If a member agency's eligibility to participate in the Campaign is withdrawn by the Committee, the federation may not distribute any funds raised in the Campaign to such agency.

The plaintiff Connecticut Rivers Council, Boy Scouts of America, is a private, non-profit organization chartered by the Boy Scouts of America to support scouting in the Connecticut counties of Litchfield, Hartford, Windham, New London, and Middlesex. Connecticut Rivers Council and three other Connecticut councils are member agencies of local chapters of the United Way in Connecticut. The Connecticut councils of the BSA applied to the Committee to participate in the Campaign. In those applications, the BSA affirmatively answered that it had a written policy of nondiscrimination. In 1999, all four Boy Scout councils received donations from the Campaign directly earmarked for them by individual donors, and upon application to their local United Way, received funds from the pool of donated funds received by the United Way chapters in Connecticut.

Although the BSA certified to the Committee that it did not discriminate, the BSA adopted a position, memorialized in its writings as long as ten years ago, that is allegedly inconsistent with Connecticut's nondiscrimination policy based upon sexual orientation. On October

6, 1999, the Committee received an unsolicited letter from the Executive Director of the CHRO, Cynthia Watts-Elder, pointing out that by allowing the BSA to participate in the Campaign and to benefit from a fundraiser that uses state resources, the Committee potentially makes the state a party to discrimination. The impetus for the letter was the New Jersey Supreme Court decision in *Dale v. Boy Scouts of America,* 734 A.2d 1196 (1999). The Executive Director wrote that "recently, a court decision has decided that it is discriminatory for the Boy Scouts of America to expel an Assistant Scoutmaster who publicly declared that he was gay."

In reaction to the October 6, 1999, letter from the CHRO, the Committee sought an immediate clarification from the BSA. In response to that query, the Committee received a letter from Scout Executive Harry Pokorny of the plaintiff Connecticut Rivers Council, BSA, expressing the BSA's national position on homosexuality, which clearly stated that the BSA cannot register homosexuals. Because of the apparent conflict between the Boy Scout's attestation in its application of having a nondiscrimination policy in place, the October letter pronouncing the national position of the BSA on homosexuality, and the New Jersey Supreme Court decision, the Committee became concerned that it might be violating Connecticut statutes that proscribe the state from furthering discrimination that is prohibited by law. The Committee presented the CHRO with a petition for a declaratory ruling on the matter.

The CHRO sought and received information from the Committee, the BSA, and other interested parties in the course of the declaratory rulings proceedings. On April 27, 2000, the CHRO conducted a fact-finding hearing to assist it in rendering its decision.

The Committee's petition for declaratory ruling, dated November 19, 1999, asked the following two questions:

> 1. Does the BSA's and/or its local councils' policy or policies on sexual discrimination violate any state anti-discrimination statute or regulation over which your agency has any oversight or jurisdiction?
>
> 2. Is the Committee's inclusion of BSA member agencies in the State Employee Campaign in violation of any state law over which your agency has oversight or jurisdiction, including but not limited to Conn. Gen. Stat. Sections 46a-81(d), 46a-811 and 46a-81n?

The CHRO issued its first declaratory ruling on May 12, 2000, answering only the second question. The CHRO found that the state would be in violation of the enumerated statutes of the Gay Rights Law if it were to retain the BSA in its Campaign. Acting in accordance with the declaratory ruling, the Committee notified the various United Way federations that their member Boy Scout Councils would not be able to participate in the upcoming Year 2000 Campaign. On July 31, 2000, the Committee excluded twenty nine other organizations from participating in the 2000 campaign for failure to comply with the Committee's non-discrimination requirement.

The present action was commenced on June 7, 2000, by the BSA filing a motion for temporary restraining order and preliminary injunction. The BSA sought to enjoin the defendants from reallocating undistributed donations designated to Boy Scout councils during the 1999 Campaign, and to enjoin them from "failing to take all necessary steps to ensure the inclusion of Boy Scout councils in Connecticut as participants in the 2000 Charitable Campaign."

The Court heard oral argument on the preliminary injunction on June 19, 2000, and on June 26, 2000, the Court ordered the defendants to refrain from distributing any charitable donations made by Connecticut state employees to the BSA, but instead to establish an escrow account[1] and deposit into it all funds that Connecticut State employees designated and authorized to be deducted from their paychecks for donation to the BSA in the 1999 Campaign, and all undesignated funds to which the BSA would be entitled under the rules and regulations of the Campaign. The Committee had taken no action with regard to the Year 1999 Campaign, and the BSA continued to receive state employee donations right up to the time the Court issued the order establishing the escrow account.

On November 15, 2000, the CHRO issued a declaratory ruling answering the first question raised by the Committee. The CHRO found that although the BSA may lawfully exclude openly gay men and/or avowed homosexuals as adult leaders, its policy of excluding gay employees is covered by Connecticut's anti-discrimination statutes.

On July 7, 2000, the CHRO received another request for a declaratory ruling from the Committee asking:

> What is the effect of the United States Supreme Court decision in *Boy Scouts of America v. Dale*, No. 99-699 (2000 U.S. Lexis 4487)[2] on the CHRO's Declaratory Ruling dated May 12, 2000, and issued to the SECC?

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[1] All escrowed funds are to be held and maintained by the State Treasurer in an interest-bearing account within the State's Short Term Investment Fund, established pursuant to Conn. Gen. Stat. § 3-27a, and such funds are to be available for disbursement within five business days pursuant to further order of this Court.

[2] 530 U.S. 640 (2000).

On February 8, 2001, the CHRO issued its declaratory ruling and concluded that *BSA v. Dale* does not substantively impact the CHRO's declaratory ruling dated May 12, 2000. The CHRO found that the Committee's inclusion of the Boy Scout member agencies violates Connecticut's Gay Rights Law.

It is undisputed that the BSA excludes known or avowed homosexuals from participating as adult volunteer leaders. The BSA refuses to employ known or avowed homosexuals, and also prohibits gay boys from membership and from participating in scouting. Finding that the administration and effectuation of the Campaign constitutes state action, the CHRO concluded that the inclusion of a known discriminator as a beneficiary of the Campaign would cause the state to be a party to discrimination in violation of the Gay Rights Law.

DISCUSSION

A motion for summary judgment will be granted where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). "Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper." *Bryant v. Maffucci,* 923 F. 2d 979, 982 (2d Cir.), *cert. denied,* 502 U.S. 849 (1991).

The burden is on the moving party to demonstrate the absence of any material factual issue genuinely in dispute. *American International Group, Inc. v. London American International Corp.,* 664 F. 2d 348, 351 (2d Cir. 1981). In determining whether a genuine factual issue exists, the court must resolve all ambiguities and draw all reasonable inferences against the moving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986). If a nonmoving party has failed to make a suf-

ficient showing on an essential element of his case with respect to which he has the burden of proof, then summary judgment is appropriate. *Celotex Corp.*, 477 U.S. at 323. If the nonmoving party submits evidence which is "merely colorable," legally sufficient opposition to the motion for summary judgment is not met. *Anderson,* 477 U.S. at 249.
issue.

In general, federal courts give considerable deference to the judgment of administrative agencies that are in charge of enforcing the statute at issue. *Chevron, U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837, 844 (1984). Similarly, Connecticut courts defer to the statutory interpretation of Connecticut administrative agencies with such enforcement powers. *Nichols v. Warren,* 209 Conn. 191, 202 (1988). However, the Connecticut Supreme Court has stated that where a state statute is interpreted by a state administrative agency in the first instance, and has not previously been subjected to judicial scrutiny, such statutory construction is a question of law and the agency interpretation is not entitled to any special deference. *Id.* at 203; *Burinskas v. Dept. of Social Services,* 240 Conn. 141, 147 (1997).

The statutes at issue here, Conn. Gen. Stat. §§ 46a-81a through 46a-81r, are collectively known as the Gay Rights law. The specific sections that apply to this action are §§ 46a-81i, 46a-81l, and 46a-81n, whereby the state is prohibited from using any of its facilities in the furtherance of discrimination or becoming a party to any agreement or plan which has the effect of sanctioning discrimination.

This Court deems that deference to the CHRO is warranted in the instant case. This is not a case of first impression in which interpretation of the Gay Rights

Law regarding state action is being subjected to judicial scrutiny for the first time. The controlling case law is the Connecticut Supreme Court's decision in *Gay and Lesbian Law Students Assn. v. Board of Trustees,* 236 Conn. 453 (1996),[3] and the CHRO was required to follow that case precedent in its declaratory ruling.

BSA alleges violation of 42 U.S.C. § 1983

The BSA alleges that its exclusion from participation in the Campaign violates its right to freedom of speech and freedom of association protected by the First and Fourteenth Amendments to the United States Constitution. It alleges that the state of Connecticut cannot exclude the BSA from a state-created charitable forum on the basis of viewpoints with which the Committee may disagree.

The parties are in agreement that the controlling law on this issue may be found in *Cornelius v. NAACP Legal Defense and Education Fund,* 473 U.S. 788 (1985). *Cornelius* establishes the rules that are applicable to a governmental workplace campaign: (1) the campaign is a non-public forum; (2) no finding of strict incompatibility between the nature of the speech or the identity of the speaker and the functioning of the nonpublic forum is mandated; and (3) exclusion of a participant from the campaign need only be reasonable, viewpoint neutral and based upon all the surrounding circumstances. *Id.* at 806-09. The defendants allege, and this Court agrees, that the cases cited by the BSA are all cases that involve public fora or limited public fora as opposed to the non-

[3] The Connecticut Supreme Court held that the United States military was prohibited from using the facilities and career services office of the University of Connecticut School of Law for recruitment purposes because of the military's current discrimination against gay men and lesbians.

public forum designation of a government employer-sponsored workplace charitable campaign as set forth in *Cornelius*. Exclusion from a public forum requires a compelling state interest, a much more stringent requirement than the reasonableness test of exclusion from a nonpublic forum: "Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Id.* at 806. The Court recognizes that compliance with a neutral non-discrimination law is a reasonable requirement for inclusion in the Campaign.

The BSA alleges it was targeted for exclusion from the Campaign for its views on homosexuality while other known discriminating organizations were allowed to participate. The BSA admonishes the Court that "any fool knows that the Girl Scouts limit membership to girls, and it is obvious from their names that the National Black Child Development Institute devotes itself to African-American children and that Services for the Elderly in Farmington limits its services on the basis of age."[4]

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[4] Addressing the BSA's conviction that the Girl Scouts of America also discriminates because it limits its membership to girls, the Court directs the BSA to the exceptions to sex discrimination under 20 U.S.C. § 1681:

> (a) Prohibitions against discrimination; exceptions
>
> (6) Social fraternities or sororities; voluntary youth service organizations
>
> this section shall not apply to membership practices --
>
> (B) Of the Young Men's Christian Association, Young Woman's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age.

To support this allegation, the BSA cites a Florida case, *Boy Scouts of America v. Till,* 136 F.Supp.2d 1295 (S.D.Fla. 2001), where the school board for Fort Lauderdale was preliminarily enjoined from excluding Boy Scouts from meeting in public schools. The BSA opines that "there, as here, the school board, while requiring all organizations to sign a nondiscrimination form, permitted school use by a whole variety of organizations which discriminated on a number of grounds -- including Girl Scouts, church groups, and a black sorority."

The BSA is misguided in its reliance on *Till.* In that case, the Broward County School Board had an anti-discrimination policy, known as Policy 1341, that prohibited the rental use or enjoyment of school facilities by any group that "discriminates on the basis of age, race, color, disability, gender, marital status, national origin, religion, or sexual orientation." Prompted by the Supreme Court decision in *B.S.A. v. Dale,* and the Boy Scout's policy of excluding homosexual children and adults from group membership, the school board terminated the five-year partnership agreement it had with the Boy Scouts, and deemed the Boy Scouts ineligible to rent and lease school facilities because of the violation of the School Board's anti-discrimination policy. The Boy Scouts brought action against the school board, alleging that their exclusion from school facilities during off-school hours violated the First Amendment. The Boy Scouts moved for preliminary injunction, which was granted by the district court.

Unlike the Connecticut Gay Rights law which governs here, the Florida Civil Rights Act of 1992, F.S.A. §§ 760.01-760.10, does not protect individuals from discrimination because of sexual orientation. Despite the School Board's stated and commendable goal of preparing its children for participation as citizens and teaching

them tolerance, the Broward County School Board did not have the benefit of a state anti-discrimination law to back it up. The district court held that the exclusion of the Boy Scouts from use of the school facilities was viewpoint-based, and that the BSA was likely to prevail on its claim. Additionally, the forum created in *Till* was a limited public forum, unlike the non-public forum in *Cornelius* and in the present action.

It is undisputed that the BSA is in the unique position of being allowed to discriminate legally against gays and lesbians by the ruling of the United States Supreme Court. In *B.S.A. v. Dale,* the Court ruled that New Jersey's law against discrimination which forced the Boy Scouts to admit James Dale, an openly gay assistant scoutmaster, violated the BSA's freedom of expressive association. The result of the case is clear: the BSA has a right to exclude homosexuals.

In the present case, neither the Committee or the CHRO is attempting to circumvent the Supreme Court by forcing the BSA to admit homosexuals in violation of the *Dale* ruling. It has been readily acknowledged by all parties that the BSA may discriminate on the basis of sexual orientation. If the BSA changes its policy in the future and no longer discriminates, and attests to that in its application to the Campaign, the Committee could legally allow them to participate, but the issue before this Court is not a matter of the BSA's viewpoint on homosexuality, but of the BSA's compliance with the laws of the State of Connecticut.

The BSA also provides a list of groups which have "views on the morality of homosexual conduct," and are still allowed to participate in the Campaign. The list includes Parents, Families, & Friends of Lesbians and Gays ("PFLAG"), which the BSA states "opposes Boy Scouts' moral views regarding homosexual conduct, and

asserts that one's sexual orientation and gender identity are separate from one's moral values and actions." The BSA does not, however, allege any discrimination on the part of PFLAG, or the other groups that it categorizes as gay and lesbian organizations, regarding their membership or employment practices.

The BSA correctly states that the Campaign "does not prohibit groups that teach moral values, groups that seek to build character, groups that serve youth, groups that serve one sex, groups with a religious perspective, or groups that take a position on the morality of homosexual conduct -- all of which might describe the Boy Scouts." However, the CHRO points out that the BSA confuses "discriminatory membership and employment policies, like theirs, with the provision of services by organizations having their missions directed to help groups identified by, for example, sex, race, age, ethnic background, religion, or sexual orientation." The record does not support the BSA's intimation of discrimination by such groups.

The BSA concedes that the Connecticut Supreme Court sets forth the law which all state agencies must follow. In *Gay and Lesbian Law Students Assn.*, that court stated that "the public policy of this state is unequivocal: Discrimination based upon sexual orientation is prohibited and those who persist in discriminating against gay men and lesbians will, among other sanctions, be barred from utilizing state facilities unless specifically exempted." 236 Conn. at 491.

In Conn. Gen. Stat. §§ 46a-81p and 46a-81q, the Connecticut legislature specifically exempted religious groups and the ROTC from the Gay Rights Law. "Where express exceptions are made, the legal presumption is that the legislature did not intend to save other cases from the operation of the statute." *Gay and Lesbian Law Students*

Assn., 236 Conn. at 495. The legislative history discloses that Boy Scouts, Girl Scouts, and camps for young people, both church-affiliated and non-church affiliated, were discussed. In response to a question of whether the hiring practices of a private, non-church affiliated camp for young men would be exempted from the law, Representative Tulisano, sponsor of the legislation, responded that the bill's exemption was limited to religious organizations and entities so that there would not be an exemption for non-religious organizations. The opportunity to exempt the Boy Scouts from the Gay Rights Law was available to the legislature, but was not seized upon by that body.

Finally, the BSA claims that had it not been excluded from the Campaign, the BSA would have completed and returned the non-discrimination form as it had in prior years, checking "Yes" to Question 11 of the application (asking whether the organization is in compliance with non-discrimination law). The BSA asks the Court to declare that its lawful and constitutionally-protected right to discriminate on the basis of sexual orientation is synonymous with compliance with the non-discrimination laws of the state, specifically, the Gay Rights Law. The Court finds to the contrary.

In accordance with the Connecticut Supreme Court's ruling in *Gay and Lesbian Law Students Assn.*, the plain language of the Connecticut statutes, and the CHRO's interpretation of same, this Court finds that the BSA has failed to satisfy its burden of establishing a violation of the BSA's constitutional rights by the Committee under 42 U.S.C. § 1983.

Violation of Connecticut Agencies Regulations § 5-262-3(k)

The BSA alleges that removal of the BSA from the Campaign constitutes a violation under § 5-262-3(k) of the Regulations of Connecticut State Agencies. That section states in pertinent part that "an organization is eligible to participate in the Charitable Campaign so long as it has a stated policy of non-discrimination and is in compliance with all the requirements of law and regulations respecting non-discrimination, equal employment opportunity, and public accommodations with respect to its programs, clients, officers, employees, and volunteers.

At the time the BSA filed its complaint, the Commission had not declared whether the BSA membership policies of excluding persons who openly hold themselves out as homosexuals violated any Connecticut anti-discrimination statute. Consequently, the BSA deems that there was no basis in state law for excluding them from the Campaign. On November 15, 2000, however, the CHRO did deliver its declaratory ruling, and held that the BSA was in violation of Connecticut's Gay Rights Law. In addition, the U.S. Supreme Court ruling in *Dale* left no doubt that the BSA has the right to discriminate, and to exclude persons who openly hold themselves out as homosexuals. Consequently, the Court finds no violation of the Connecticut State Agency Regulations on the part of the defendants.

Violation of Conn. Gen. Stat. § 46a-81r

The BSA next alleges that to the extent that the Committee seeks to penalize the BSA for excluding open homosexuals from leadership positions, it would be illegally condoning homosexuality and requiring the teaching in educational institutions of homosexuality as an

acceptable lifestyle, in violation of Conn. Gen. Stat. § 46a-81r. The BSA states that it is an educational institution that instills its values in boys through adult role models.

Section 46a-81r states in pertinent part that

> Nothing in sections 4a-60a, 45a-726a, 46a-51, 46a-54, 46a-54, 46a-56, 46a-63, 46a-64b, 46a-65, 46a-67, 46a-68b, and 46a-81a to 46a-81q, inclusive, subsection (d) of section 46a-82, subsection (a) of section 46a-83, and sections 46a-86, 46a-89, 46a-90a, 46a-98, 46a-98a, and 46a-99 shall be deemed or construed (1) to mean the state of Connecticut condones homosexuality or bisexuality or any equivalent lifestyle, (2) to authorize the promotion of homosexuality or bisexuality in educational institutions or require the teaching in educational institution of homosexuality or bisexuality as an acceptable lifestyle. . . .

The Connecticut Statutes do not give a definition of educational institutions per se, so the Court looks again to the United States Code, specifically 20 U.S.C. § 1681(c), for guidance. Educational institution is defined, for purposes of Chapter 38 on Discrimination Based on Sex or Blindness, as

> any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such school means each such school, college, or department.

Not only does the BSA fail to fit this definition of educational institution, they are specifically categorized

under "social fraternities or sororities; voluntary youth service organizations" under 20 U.S.C. 1681. The Court finds no merit in the BSA's argument that it is an educational institution under the law.

The Committee argues, and the Court concurs, that it is not attempting to coerce the BSA into accepting homosexuals as volunteers, employees, or members, in violation of the ruling in *B.S.A. v. Dale*. The plain language of Conn. Gen. Stat. § 46a-81r states that the anti-discrimination statutes are not to be construed as the state of Connecticut condoning homosexuality or any other alternative lifestyle. Likewise, the actions of the Committee in adhering to the laws of the state are not to be construed as state action condoning homosexuality. The Court finds no violation of Conn. Gen. Stat. § 46a-81r.

Violation of Conn. Gen. Stat. § 46a-81a

The BSA alleges that it is being penalized by the Committee for "having a preference for heterosexuality," in violation of Conn. Gen. Stat. § 46a-81a. Because the section allegedly violated is the definition section for the statutes known as the Gay Rights Law, the Court construes the BSA's allegation as a violation of the Gay Rights Law for reverse discrimination. The BSA is misguided in substituting a definition of sexual orientation for the substantive statutes. There is no statute penalizing an individual or entity for sexual preference, be it heterosexual, homosexual, or bisexual, nor is the Committee doing so. The prohibition is on discriminating against an individual on the basis of his or her preference. That fact that the BSA may legally discriminate on the basis of sexual orientation is *res judicata*. The Committee must react on this basis, and adhere to the statutory and case law under which it is bound by law, as

interpreted by the CHRO. It has been determined that the Committee's action in terminating the BSA's participation in the Campaign was view-point neutral. The BSA's circular reasoning under this count is unpersuasive.

Conclusion

For the reasons set forth above, the BSA's motion for summary judgment (Doc.# 56) is DENIED. Defendant Committee's motion for summary judgment (Doc. # 50) is GRANTED. Defendant-intervenor CHRO's motion for summary judgment (Doc. # 53) is GRANTED.

The motions for temporary restraining order (Doc.#3), preliminary injunction (Doc. #4), to dismiss (Doc. #20), and to modify [15-1] order (Doc. #34), are DENIED AS MOOT.

SO ORDERED.

WARREN W. EGINTON

WARREN W. EGINTON, Senior U.S.D.J.

Dated this 22nd day of July, 2002, at Bridgeport, Connecticut.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Filed August 26, 2003
Docket No. 02-9000

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the _____ day of August two thousand three.

BOY SCOUTS OF AMERICA, and CONNECTICUT RIVERS COUNCIL, BOY SCOUTS OF AMERICA,

Plaintiffs-Appellants,

—v.—

NANCY WYMAN, In her capacity as Comptroller of the State of Connecticut and as a member of the Connecticut State Employee campaign Committee, CAROL CARNEY, In her Capacity as Chair of the Connecticut State Employee Campaign Committee, MARGARET DIACHENKO, RICHARD EMONDS, PALUEL FLAGG, CHRISTINE FORTUNATO, BURTON GOLD, CAROL GUILIANO, CAROL HAMILTON, MARILYN KAIKA, JOAN KELLY-COYLE, D'ANN MAZZOCCA, BERNARD MCLOUGHLIN, MICHAEL NICHOLS, WILLIAM PHILLIE, CHERYL SWAIN, NOEL THOMAS,

in their capacities as members of the Connecticut State Employee Campaign Committee,

Defendants-Appellees,

COMMISSION ON HUMAN RIGHTS & OPPORTUNITIES,

Intervenor-Defendant-Appellee,

CONNECTICUT COALITION FOR LESBIAN, GAY, BISEXUAL & TRANSGENDER CIVIL RIGHTS, CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, INC. and GAY & LESBIAN ADVOCATES & DEFENDERS,

Movants.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Boy Scouts of America.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT:
ROSEANN B. MACKECHNIE, CLERK
by

ARTHUR M. HELLER
Arthur M. Heller
Motions Staff Attorney

APPENDIX D

STATUTORY PROVISIONS

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Conn. Gen. Stat. § 46a-71. Discriminatory practices by state agencies prohibited

(a) All services of every state agency shall be performed without discrimination based upon race, color, religious creed, sex, marital status, age, national origin, ancestry, mental retardation, mental disability, learning disability or physical disability, including, but not limited to, blindness.

(b) No state facility may be used in the furtherance of any discrimination, nor may any state agency become a

party to any agreement, arrangement or plan which has the effect of sanctioning discrimination.

(c) Each state agency shall analyze all of its operations to ascertain possible instances of noncompliance with the policy of sections 46a-70 to 46a-78, inclusive, and shall initiate comprehensive programs to remedy any defect found to exist.

(d) Every state contract or subcontract for construction on public buildings or for other public work or for goods and services shall conform to the intent of section 4a-60.

Conn. Gen. Stat. § 46a-74. State agencies not to permit discriminatory practices in professional or occupational associations, public accommodations or housing

No state department, board or agency may permit any discriminatory practice in violation of section 46a-59, 46a-64 or 46a-64c.

Conn. Gen. Stat. § 46a-76. Discrimination in allocation of state benefits prohibited

(a) Race, color, religious creed, sex, marital status, age, national origin, ancestry, mental retardation, mental disability, learning disability or physical disability, including, but not limited to, blindness shall not be considered as limiting factors in state-administered programs involving the distribution of funds to qualify applicants for benefits authorized by law.

(b) No state agency may provide grants, loans or other financial assistance to public agencies, private institutions or organizations which discriminate.

Conn. Gen. Stat. § 46a-81a. Sexual orientation discrimination: Definitions

For the purposes of sections 4a-60a, 45a-726a and 46a-81b to 46a-81r, inclusive, "sexual orientation" means having a preference for heterosexuality, homosexuality or bisexuality, having a history of such preference or being identified with such preference, but excludes any behavior which constitutes a violation of part VI of chapter 952.

Conn. Gen. Stat. § 46a-81i. Sexual orientation discrimination: Services of state agencies

(a) All services of every state agency shall be performed without discrimination based upon sexual orientation.

(b) No state facility may be used in the furtherance of any discrimination, nor may any state agency become a party to any agreement, arrangement or plan which has the effect of sanctioning discrimination.

(c) Each state agency shall analyze all of its operations to ascertain possible instances of noncompliance with the policy of sections 46a-81h to 46a-81n, inclusive, and shall initiate comprehensive programs to remedy any defect found to exist.

(d) Every state contract or subcontract for construction on public buildings or for other public work or for goods and services shall conform to the intent of section 4a-60a.

Conn. Gen. Stat. § 46a-81*l*. Sexual orientation discrimination: State agencies not to permit in professional or occupational associations, public accommodations or housing

No state department, board or agency may permit any discriminatory practice in violation of section 46a-81b, 46a-81d or 46a-81e.

Conn. Gen. Stat. § 46a-81n. Sexual orientation discrimination: Allocation of state benefits

(a) Sexual orientation shall not be considered as a limiting factor in state-administered programs involving the distribution of funds to qualify applicants for benefits authorized by law.

(b) No state agency may provide grants, loans or other financial assistance to public agencies, private institutions or organizations which discriminate, unless exempted as provided in section 46a-81p.

Conn. Gen. Stat. § 46a-81r. Sexual orientation discrimination: Construction of statutes

Nothing in sections 4a-60a, 45a-726a, 46a-51, 46a-54, 46a-56, 46a-63, 46a-64b, 46a-65, 46a-67, 46a-68b, and 46a-81a to 46a-81q, inclusive, subsection (d) of section 46a-82, subsection (a) of section 46a-83, and sections 46a-86, 46a-89, 46a-90a, 46a-98, 46a-98a and 46a-99 shall be deemed or construed (1) to mean the state of Connecticut condones homosexuality or bisexuality or any equivalent lifestyle, (2) to authorize the promotion

of homosexuality or bisexuality in educational institutions or require the teaching in educational institutions of homosexuality or bisexuality as an acceptable lifestyle, (3) to authorize or permit the use of numerical goals or quotas, or other types of affirmative action programs, with respect to homosexuality or bisexuality in the administration or enforcement of the provisions of sections 4a-60a, 45a-726a, 46a-51, 46a-54, 46a-56, 46a-63, 46a-64b, 46a-65, 46a-67, 46a-68b, and 46a-81a to 46a-81q, inclusive, subsection (d) of section 46a-82, subsection (a) of section 46a-83, and sections 46a-86, 46a-89, 46a-90a, 46a-98, 46a-98a and 46a-99, (4) to authorize the recognition of or the right of marriage between persons of the same sex, or (5) to establish sexual orientation as a specific and separate cultural classification in society.

APPENDIX E

REGULATIONS

Conn. Agencies Regs. § 5-262-3. Eligibility standards

To be eligible for approval for participation in the State Employee Campaign, a federation and all of its participating member agencies must:

(a) Be incorporated or authorized to do business in the State of Connecticut as a private non-profit organization and, unless exempt pursuant to Section 21a-190d of the Connecticut General Statutes, registered with the Department of Consumer Protection in compliance with the provisions of Sections 21a-190b and 21a-190c of the Connecticut General Statutes.

(b) Be engaged in the delivery of charitable and public health, welfare, environmental, conservation or service purposes.

(c) Maintain its status as a 501(c)(3) tax exempt entity pursuant to the Internal Revenue Code.

(d) Be directed by an active Board of Directors which meets regularly and whose members serve without compensation.

(e) Provide for an annual external audit by a certified public accountant, if its annual budget is $50,000 or greater. Organizations whose annual budget is less than $50,000 may provide for an annual external financial review by a certified public accountant in lieu of an external audit report.

(f) File an IRS Form 990, if required to do so by federal law or regulation.

(g) Provide accurate information as to the percentage of its budget which is used for fund raising and administrative purposes.

(h) Not expend more than 25 percent of its annual revenue for administrative and fundraising expenses. The SECC may grant an exception for good cause.

(i) Verify that its publicity and promotional activities assure protection against the sale or exchange of its SEC contributor list and permit no payment of commissions, kickbacks, finder's fees, or bonuses for fund raising in connection with the SEC.

(j) Ensure that its publicity and promotional activities are based upon its actual program and operations, are truthful and non-deceptive, and include all material facts relative to its cause.

(k) Have a stated policy of non-discrimination and be in compliance with all requirements of law and regulations respecting non-discrimination, equal employment opportunity, and public accommodations with respect to its programs, clients, officers, employees and volunteers.

(l) Demonstrate a history of service of not less than 12 months prior to the date of application to participate in the SEC.

(m) Not have been organized exclusively for the purpose of soliciting contributions from state employees.

(n) Disclose to the SEC that it or any of its directors, officers or employees are the subject of any investigation or legal proceeding by any federal, state or local law enforcement authority based upon its charitable solicitation activities, delivery of program services, or use of

funds, not later than ten days after being informed of such investigation or proceedings and disclose the outcome of any such investigation or proceeding not later than ten days after such outcome.

(15)

No. 03-956

FEB 17 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and CONNECTICUT RIVERS COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

—v.—

NANCY WYMAN, in her capacity as Comptroller of the State of Connecticut and as a member of the Connecticut State Employee Campaign Committee, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Brief in Opposition does not seriously contest that the Second Circuit's decision conflicts with (1) *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and other expressive association decisions of this Court; (2) *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995), and other viewpoint discrimination decisions of this Court; and (3) this Court's "unconstitutional conditions" cases holding that groups may not be required to forfeit First Amendment rights in order to be eligible to participate in government programs.

Rather, Respondents' principal argument is that this case is controlled by *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. 788 (1985), and that this Court's decisions in *Dale*, *Hurley*, and other expressive association cases, as well as this Court's unconstitutional conditions cases, do not apply because they do not involve exclusion from a government employee charitable campaign. There is no basis to Respondents' curious position that they are excused from having to comply with the constitutional principles set forth in later cases such as *Dale* and *Rosenberger* because their facts are closer to those of *Cornelius*, an earlier case. In any event, far from supporting the result below, *Cornelius* is just one more Supreme Court case with which the Second Circuit's decision is in conflict.

The issue is thus squarely joined: May a group's exercise of its First Amendment right to control its own membership practices serve as the basis for exclusion from a state charitable campaign in which the group otherwise would have been included?

1. Respondents assert that the Second Circuit's decision does not conflict with *Dale* because "respondents have never tried to prevent the BSA from enforcing its membership or hiring policies." (Op. at 7.) But the rights of expressive association recognized in *Dale* are protected against either direct or indirect interference.

Respondents assert that "BSA fails to cite any part of the *Dale* decision to establish this contention." (Op. at 8.) That is not true. As we noted in the Petition (Pet. at 13), *Dale* recognized that interference with rights of expressive association can "take many forms." 530 U.S. at 648. *Dale* drew on a long line of cases holding that the Constitution can be violated by indirect state interference with expressive association. *E.g.*, *Healy v. James*, 408 U.S. 169, 183-86 (1972) ("the Constitution's protection is not limited to direct interference" with expressive association, but extends to state action "denying rights or privileges" based on association); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461-63 (1958) (required disclosure of membership lists is an unconstitutional burden on associational rights). Moreover, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), did not involve direct state regulation of group membership, but a condition on group expression attached to a parade permit. *See Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) (citing *Healy* and *Patterson* and noting that violation of expressive association can result where government seeks to "impose penalties or withhold benefits" based on exercise of associational rights).

Dale embraced the principles of these cases. *See* 530 U.S. at 648-50 (*Roberts*); *id.* at 653-56 (*Hurley*). It is

Respondents who seek to turn *Dale's* strong *reaffirmation* of freedom of expressive association into a new and unprincipled *limitation* of that right to cases involving direct state compulsion. From *Healy* to *Hurley*, the Court's cases make plain that the freedom of expressive association can be violated by imposition of burdens, penalties, or exclusions. The Second Circuit's decision unquestionably conflicts with this line of cases.

2. Their reliance on *Cornelius* as controlling does not permit Respondents to escape the reach of *Rosenberger* and the other viewpoint discrimination cases because *Cornelius* itself holds that exclusion on the basis of a group's viewpoint is unconstitutional. *Cornelius*, 473 U.S. at 811. As noted in the Petition, this Court has consistently held that a group may not be excluded from a forum or benefit to which it would otherwise be granted access on the basis of its viewpoint, identity, or perspective. (*See* Pet. at 16-19 (collecting cases).) Further, this Court has consistently held that government may not condition an otherwise-available benefit on relinquishment of First Amendment rights. (Pet. 20-22.) "'For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.'" *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 72 (1990) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (citation omitted)). Nothing in *Cornelius* purports to exempt government charitable campaigns from that vital principle of First Amendment law.

Respondents' only answer is to assert that the question whether an exclusion is viewpoint-based is one of *fact* rather than *law*. (Op. at 8.) However, the Second Circuit held, as a matter of law, that exclusion of the Boy Scouts was "not obviously viewpoint discriminatory" because it was based on the Scouts' "conduct, not . . . expression." (22a.) The Second Circuit acknowledged that the Boy Scouts were excluded because of their leadership policies with respect to open homosexuality – policies that are based on, and express, the Scouts' moral viewpoint. (18a.) Yet the court held that Connecticut does not engage in viewpoint discrimination when it applies a facially neutral law to require that expressive associations "pay[] a price" for their leadership policies (26a), because in so doing the State "regulates membership and employment policies as conduct, not as expression" (22a). The state laws at issue in *Dale* and *Hurley* were not enacted with the intent of infringing the speech and associational rights of the Boy Scouts and the South Boston Allied War Veterans. But since they had that effect as applied by state officials to the activities of those organizations, the statutes were unconstitutional as applied. Here, even if Connecticut law on its face is aimed at conduct rather than expression, Respondents elected to apply that law to Boy Scouts' expressive leadership policies, thereby making them pay a price for that expression. The Second Circuit's error in upholding that viewpoint-discriminatory application of Connecticut law is thus sufficient to support reversal.

Accordingly, this Court need not reach the question whether the Second Circuit correctly evaluated the evidence

to support Boy Scouts' claims of selective enforcement and biased procedures.

3. However, were the Court to "conduct an independent examination of the record as a whole," *Hurley*, 515 U.S. at 567, it would find far more evidence of selective enforcement and discriminatory motive than the minimum required to avoid summary judgment.

Connecticut has repeatedly stated that even if it is lawful for campaign participants to discriminate on the basis of religion, sex, race, age, and sexual orientation in their services, membership or employment, it is nevertheless unlawful for Connecticut to support such discrimination. Yet many campaign participants overtly discriminate in the delivery of services, membership, or employment on one or more of these grounds. (*E.g.*, A 353 at 67-68; A 546, A 669; A 569; A 561.) Furthermore, there is substantial evidence of State officials' hostility to Boy Scouts' viewpoint. (*See* Pet. at 6-7.)

The Court need not reach these factual issues. If nothing else, however, the Second Circuit's careless reading of the factual record does not provide grounds for confidence in its legal conclusions.

4. Respondents seek to deny a conflict with *Cuffley v. Mickes*, 208 F.3d 702 (CA8 2000), *cert. denied*, 532 U.S. 903 (2001), claiming that *Cuffley* is distinguishable because the Eighth Circuit found Missouri's reasons for excluding the Klan from its Adopt-a-Highway program to be pretextual. (*See* Op. at 9-10.) While *some* of Missouri's justifications were found to be pretextual, no such finding was made about the reason that is relevant here – that the

Klan's racial restrictions on membership violated state nondiscrimination requirements. The Eighth Circuit held that to exclude the Klan on the ground that its viewpoint-based membership practices were discriminatory would "violate the Klan's freedom of political association" and constitute "an unconstitutional condition on the Klan's participation in the Adopt-A-Highway program." *Cuffley*, 208 F.3d at 708-09. This holding is irreconcilable with the Second Circuit's holding here. (*See* 19a-26a.)

5. As shown in the Petition, the decision below threatens the First Amendment rights of many groups. (Pet. 23-28.) The impact of a concept that organizations may be made to "pay a price" for exercising their First Amendment rights is limited only by the imaginations of government officials hostile to traditional values. As *amici* have noted,

> "The escalating attacks confronting the Boy Scouts are merely a foretaste of what awaits religious organizations unless this decision is corrected. If not, many expressive associations that choose to reflect any controversial views on abortion, female clergy, homosexual marriage, contraceptive medical coverage, and religious affiliation through their membership and hiring policies will risk having to change their messages or face an avalanche of lawsuits."

Brief of *Amici Curiae* The Becket Fund for Religious Liberty, The Center for Public Justice, The Ethics & Religious Liberty Commission of the Southern Baptist Convention, and The Union of Orthodox Jewish

Congregations of America in Support of Petitioners, dated Feb. 5, 2004, at 3-4.

> "The implications of this decision reach far beyond the parties involved in the present litigation . . . . Indeed, permitting this decision to stand would open the door for other governmental action that seeks to advance a political agenda by forcing those who oppose it to relinquish their constitutionally protected views, beliefs, and practices in exchange for a government benefit that was otherwise available. As this case demonstrates, this is particularly troubling for organizations with traditional moral values, such as the Boy Scouts, and for religious organizations, such as those that adhere to the teachings of the Roman Catholic faith."

Brief of *Amicus Curiae* Thomas More Law Center in Support of Petitioners, dated Feb. 2, 2004, at 3-4.

* * *

In short, nothing in the Brief in Opposition undermines the reasons set forth in the Petition for granting review: The decision below presents an important question of whether State government officials may circumvent *Dale* and impose penalties or deprivations on groups like the Boy Scouts if they exercise the rights this Court recognized in *Dale*. The Second Circuit's decision is a roadmap around *Dale* – and the route it proposes conflicts with this Court's viewpoint discrimination and unconstitutional conditions

cases as well. The decision below implicates the First Amendment rights of thousands of private, charitable, and religious groups around the nation and presents a recurring issue on which lower courts are divided.

CONCLUSION

For these reasons and those stated in the Petition, the Petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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(3)

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No. 03-956

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2003

♦———♦

BOY SCOUTS OF AMERICA, *et al.*,
Petitioners,

v.

NANCY WYMAN, COMPTROLLER OF THE STATE OF CONNECTICUT, *et al.*,
Respondents.

♦———♦

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

♦———♦

BRIEF OF THE AMERICAN LEGION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

♦———♦

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IN THE
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On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE AMERICAN LEGION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

♦————♦

INTEREST OF AMICUS

The American Legion ("the Legion") is the largest veterans organization in the United States, comprising more than 2,600,000 current and former members of our armed services, and long has worked to foster patriotism, character, and good citizenship. An Act of Congress chartered the Legion as a corporation in 1919. *See* Act of September 16, 1919, ch. 59, 41 Stat. 284 (currently codified at 36 U.S.C. §§ 21701-08 (2000)). The Legion's statutory purposes include upholding and defending the Constitution and supporting its members' service to their country. *See* 36 U.S.C. § 21702 (2000).

The Legion long has supported the Boy Scouts of America. Indeed at its first national convention in 1919, the Legion adopted a resolution that read, in part: "The American Legion

heartily commends the principles and achievements of the Boy Scouts and recommends that each post assist the Scout troop in its community in whatever manner practicable." Since that time the Legion's support for the Boy Scouts has remained unstinting. Legion posts throughout the United States routinely sponsor and support Boy Scout troops with financial and personal assistance. They currently support more than 2600 Boy Scout troops nationwide. And in 2000, while *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), was pending, the Legion reaffirmed its fundamental view that the Boy Scouts should retain the liberty to maintain membership and leadership standards that are consistent with its mission of instilling in young boys the virtues of a Scout.

More saliently, the Legion, like other groups, is committed to maintaining its own liberty to administer standards and membership policies consistent with its organizational goals. As a voluntary veterans organization, the Legion is vitally interested in associational freedom. There is no test for Legion membership other than honorable military or naval service to the United States. *See* 36 U.S.C. § 21703 (2000) (establishing honorable service in the armed forces during any listed period of hostilities as membership requirement). Nor has the Legion polled its members as to their personal beliefs: In all likelihood, some among the Legion's more than 2.6 million members have personal reservations about the Boy Scouts' membership and leadership standards, either because of their own beliefs or their own sexual orientation. Indeed, the Legion has at least one Post that comprises almost exclusively homosexual veterans – the Alexander Hamilton Post in San Francisco.

But this is not a case about alleged bias. It is a case about the freedom of association and the fundamental liberty of a voluntary organization to endorse traditional American values without suffering a governmental penalty because of its viewpoint. This case is, in the end, about the core American virtues of freedom to speak and freedom to associate – the very

freedoms that Legion members fought so unstintingly to preserve through their wartime service to our Nation.[1]

SUMMARY OF ARGUMENT

Review in this case is plainly warranted. The right of free association is a core constitutional right enshrined in the First Amendment as a corollary to the rights of free speech and freedom of expression. The decision of the Second Circuit threatens to eviscerate those rights by allowing the government to punish their exercise.

As this Court has already made clear, the Boy Scouts are free to exercise the right of free association by adopting membership and leadership standards consistent with the beliefs of the organization. Thus, Connecticut could not directly enforce its anti-discrimination laws to require the Boy Scouts to accept as members avowed homosexuals whom the Boy Scouts wish to exclude.

Yet, in this case Connecticut attempts to do indirectly precisely that which *Dale* precludes it from doing directly. By excluding the Boy Scouts from the general workplace charity program, Connecticut seeks to punish the Boy Scouts for the very exercise of the associational rights that *Dale* protects. In doing so Connecticut improperly attempts to enforce a governmental orthodoxy of thought by imposing a financial penalty for the expression of contrary views.

There can be little doubt that the Boy Scouts have been excluded from the workplace charity program based upon the content of their views, not some value-neutral set of criteria. No other allegedly discriminating organization has been excluded – yet the record contains evidence that many other participating organizations discriminate in the provision of

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[1] Counsel for the parties have consented to the filing of this *amicus* brief. Their joint notice of consent is on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *amicus* states that this brief was not prepared, written, funded or produced by any person or entity other than *amicus* or its counsel.

services or in their own membership policies. Connecticut's policy of discriminating among discriminators manifests its own intent to impose punishment only on those who do not conform.

Finally, taking Connecticut at its word, if this Court fails to review and reject the position advocated by Connecticut, the effects on other organizations would be extensive. The import of the rule advanced by Connecticut would permit the States to influence indirectly, in a myriad of ways, the conduct of organizations with which the States disagree. Absent review by this Court, one can readily envision States that will exclude any theistic organization, (or, in other States, any organization that does not espouse traditional values), from a wide-range of benefits. The rationale of the court below would allow exclusion from rental programs, workplace charity programs, and other indirect benefits, all as a means of enforcing a State-approved belief code.

Because of these potentially pernicious consequences, the petition should be granted and the judgment below reversed.

ARGUMENT

I. The First Amendment Interests At Stake Are Fundamental.

The decision of the Second Circuit undervalues the associational freedoms at issue in this case. This Court has long recognized that there is a core constitutional right "to enter into and maintain * * * intimate or private relationships * * * [and] to associate for the purpose of engaging in protected speech." *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 544 (1987). Thus, "implicit in the right to engage in activities protected by the First Amendment" is a "corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984).

This freedom to associate "is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas." *Dale*, 530 U.S. at 647-48; *see also Roberts*, 468 U.S. at 622 (right of expressive association is "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority"). Diversity in viewpoints and freedom of expression is not advanced by compelled governmental uniformity of views. Rather, associations are free to choose whether to propound or not propound "a particular point of view, and that choice is presumed to lie beyond the government's power to control." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 575 (1995).

Thus, as this Court has succinctly held, "[f]reedom of association * * * plainly presupposes a freedom not to associate." *Roberts*, 468 U.S. at 623. Recognizing the power of this legal principle, just three years ago this Court rejected efforts to compel the Boy Scouts to admit avowed homosexuals as members and leaders. The Boy Scouts were, correctly, adjudged to be an expressive association entitled to First Amendment protection. The forced inclusion of members who did not hold its views would significantly burden that right and was, therefore, deemed impermissible. *Dale*, 530 U.S. at 659.

Connecticut's attempt to remove the Boy Scouts from its workplace charitable campaign is nothing more than an effort to achieve indirectly what Connecticut cannot achieve directly. By failing to recognize this simple fact, the decision of the Second Circuit substantially undervalues the Boy Scouts' protected First Amendment freedom of association.

II. The Decision Of The Second Circuit Eviscerates Fundamental First Amendment Interests.

1. This Court has repeatedly held that access to generally available government programs and benefits must be granted in a "viewpoint neutral" manner, and may not be restricted based upon the content of the views expressed by those seeking

access to the government benefit. *E.g. Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (access to school facilities); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995) (access to school funding).

This conception of neutrality has found ready applicability in the context of access to governmental charitable campaigns. Thus, in *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985), this Court concluded that the federal government could limit access to its workplace charitable campaign only if the restrictions on access were "reasonable in light of the purpose served by the forum" and "viewpoint neutral." *Id.* at 806.

This should, of course, have ended the matter. As even the court below recognized, application of Connecticut's law to the charitable campaign had a "differential adverse impact" on the Boy Scouts' associational freedom to express its view. Pet. App. 23a. The existence of this disparate impact[2] is strong evidence of discriminatory intent and proof that the application of the law is not "viewpoint neutral." Given the strength of the associational freedom at issue, that should have been sufficient to determine the question.

2. As this Court has said, a restriction on access to a government-sponsored charitable campaign fails if it is "an effort to suppress expression merely because public officials oppose the speakers' view." *Cornelius*, 473 U.S. at 800. Even if it were necessary for the Boy Scouts to show more to demonstrate purposeful suppression of a disfavored viewpoint than the differential impact acknowledged by the Second Circuit, the evidence before that court amply met that burden.

Connecticut's anti-discrimination laws are, to be sure, of general applicability and not facially discriminatory in

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[2] The Second Circuit attempted to obscure the force of its conclusions by eschewing the use of the word "disparate," *see id.* n. 6, preferring to characterize the effect of the State's actions as a "differential impact." This linguistic subterfuge is unavailing for, however characterized, Connecticut's action has the effect of treating the Boy Scouts differently.

viewpoint. They are, however, applied in this instance in a discriminatory manner solely for the purpose of erecting barriers to the Boy Scouts' expression of its protected message. Connecticut manifestly turns the law of discrimination on its head, using its anti-discrimination laws to discriminate and, in the process, to enforce a compelled orthodoxy of thought.

Despite the Second Circuit's conclusion to the contrary, the record establishes that Connecticut discriminates between discriminators – it selectively enforces its laws only against the Boy Scouts' disfavored anti-homosexual viewpoint and not against any other group whose viewpoint encompasses distinctions drawn on the basis of race, gender, religion, or sexual orientation.

To this, Connecticut's only response – accepted by the Second Circuit, *see* Pet. App. 28a-30a – is that it chooses to exclude from the charitable campaign those who discriminate in their membership and employment policies while permitting organizations to participate even though they may discriminate in their policies in providing services.

But this is a distinction without a difference. The membership/service policy dichotomy does not follow from the First Amendment; nor does it follow from the text of Connecticut's anti-discrimination laws. It is false, as well, because other groups that discriminate in membership practices are included in the charitable program – presumably because their anti-*hetero*sexual bias is more condign to Connecticut's political hierarchy. The membership/service policy distinction also calls into question the considered judgment of Congress, which has permitted protected discrimination in membership while prohibiting discrimination in the provision of federally funded services. The Second Circuit's distinction is, in the end, irrational, as it ignores the ample evidence of far greater differentiation in the provision of services to different segments of the population by charitable program participants. The distinction is, in short, logically incoherent, and little more than a façade to conceal an evident anti-Boy Scout bias.

a. Nothing in the text or history of the First Amendment suggests any basis for the membership/services distinction drawn by the court of appeals. To the contrary, this Court has clearly held that governmental compulsion to abandon an associational freedom is impermissible whether it acts directly or indirectly on speech whatever form that speech takes. In *Healy v. James*, 408 U.S. 169 (1972), this Court considered an indirect effect on an organization's associational interests (there, the right of students to affiliate with national socialist student organization). As the Court trenchantly observed: "The Constitution's protection is not limited to direct interference with fundamental rights. * * * 'Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle government interference." *Id.* at 183 (citations omitted).

Connecticut's own anti-discrimination laws also counsel, strongly, against the reasonableness of the line drawn by the court below. Both the general anti-discrimination law, Conn. Gen. Stat. §§ 46a-60(2) & (6), and the sexual orientation law, *id.* §§ 46a-81c(2) & (4), make it unlawful, for example, for an employment agency -- defined as "any person undertaking with or without compensation to procure employees or opportunities to work" *id.* § 46a-51(11) -- to fail to refer for employment "*or otherwise discriminate*" against any person because of race, sex, age, religion, mental disability, learning disability, sexual orientation, or other protected classification. Thus, as the italicized portion of the statute makes clear, Connecticut's prohibition on discrimination is comprehensive – it makes no distinction between discrimination in the provision of membership and employment opportunities and the discrimination in the provision of services. Rather any organization that "otherwise discriminates" is subject to sanction – and the State's decision not to apply this ban in a comprehensive, consistent fashion is clear evidence of its viewpoint-based decision to exclude the Boy Scouts because of its disfavored speech.

And the prohibition on indirect State involvement in or support for discriminatory practices is equally broad. Connecticut law requires that "[a]ll services of every state agency * * * shall be performed without discrimination" and that "[n]o state facility may be used in the furtherance of *any* discrimination." Conn. Gen. Stat. §§ 46a-71(a) & (b) (emphasis supplied), *reprinted at* Pet. App. 57a; *see also id.* § 46a-76(b) ("No state agency may provide * * * financial assistance to * * * organizations which discriminate"), *reprinted at* Pet. App. 58a-59a. Again, the prohibition on indirectly assisting discrimination is comprehensive and absolute – a statutory judgment that directly contradicts the membership/services distinction on which the decision below is premised.

b. More saliently, there is direct evidence in the record of the viewpoint discrimination exercised by Connecticut in seeking to deny the Boy Scouts access to the workplace charitable collection program. Leslie Brett (an "out lesbian," former Chair of the Connecticut Commission on Human Rights & Opportunities, current Executive Director of the Connecticut Women's Education and Legal Fund ("CWELF"), and a member of the Stonewall Foundation), testified that Stonewall -- which is in the Directory of acceptable charitable organizations -- would exclude someone from its leadership based on heterosexual; sexual orientation:

> Q. What is the purpose of the Stonewall Foundation?
>
> A. The Stonewall Foundation is the education, public awareness organization on lesbian and gay issues.
>
> ***
>
> Q. Has the Stonewall Foundation ever [accepted] a member who was opposed to gay or lesbian rights?
>
> A. Not knowingly.
>
> Q. If they knew, they wouldn't accept that person as a member?

A. We wouldn't include that person in our activities speaking or educating the public.

***

A. We wouldn't let that person speak or represent the Stonewall Foundation.

C.A. App. 352, 353.

If Connecticut were truly to adhere to its professed policy of excluding groups based upon discriminatory membership policies it would, presumably, have begun the process of excluding Stonewall from the charity directory. To the best of *amicus*' knowledge it has not. Nor has it made any apparent effort to test whether any other groups with seemingly similar discriminatory membership policies are, in fact, pursuing those policies. *See* C.A. App. 164-65, 290, 292 (State did not consider excluding other groups).

c. The irrationality of the membership/services distinction drawn by the Second Circuit is best exemplified, however, by its inconsistency with existing federal practice. If taken seriously, the court's decision threatens a host of existing federal programs authorized by Congress.

Many charitable religious organizations offer services to the general public. But, the underlying organization is not open to all. For example, the Salvation Army may help anyone who walks through the door, but its leadership positions are limited to the faithful.

Recognizing the utility of these organizations and the services they provide, Congress has authorized them to receive federal funding to provide benefits to the needy, so long as those benefits and services are provided on a non-discriminatory basis. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, § 104, Pub. L. No. 104-193, 110 Stat. 2105. This program, known as Charitable Choice, permits States to provide federal funds through, for example, the Temporary Assistance for Needy Families ("TANF") program (codified at 42 U.S.C. § 601 *et seq.*) to faith-based organizations for use in providing services to those

who are eligible for the TANF program. States are authorized to do so notwithstanding the fact that the faith-based organization may limit *membership* based upon religious affiliation. All that a faith-based organization must do is ensure that all eligible recipients are *served* without regard for their religious affiliation.[3]

As should be evident, the decision below precisely *reverses* the paradigm adopted for Charitable Choice by the Congress. The court below considers it consistent with the First Amendment to preferentially punish the speech of those who discriminate in membership policies while allowing discrimination in the provision of services. By contrast, Congress, through the Charitable Choice programs, has expressed a preference for ensuring that services effected by government activity be provided in a non-discriminatory manner while allowing service-providers to maintain the fundamental expressive associational integrity of their organizations through membership practices that limit their membership. The decision below is so at odds with this construct that it calls into question a host of existing federal programs. Conversely, the decision below is so far contrary to Congress' considered judgment regarding the relative effects of discrimination in services and membership that it can fairly be subject to question on that basis alone.

d. The Boy Scouts' employment policy tracks what it can do constitutionally, as approved in *Dale*. There was no finding that Boy Scouts violated any employment discrimination law – only that its membership policy is one of which Connecticut disapproves. Yet, Connecticut's disapproval is a strangely limited one – it appears to apply to the Boy Scouts, and their

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[3] The Charitable Choice program has since been expanded to other federal programs, both by statute (*e.g.* Community Opportunities, Accountability, and Training and Educational Services Act of 1998, § 202, Pub. L. No. 105-285, 112 Stat. 2702 (extending Charitable Choice to Community Services Block Grants)) and executive order (*e.g.* Exec. Order 13279 (Dec. 12, 2002)).

membership practices, but to ignore examples of discrimination in the provision of services.

The record is replete with evidence that other organizations provide services to only a narrow segment of the population. In short, they "discriminate" in their services in ways that, at least textually, would appear to contravene Connecticut law (at least to the same extent that the Boy Scouts can be said to contravene it). *See* Conn. Gen. Stat. §§ 46a-60(2) & (6) (unlawful to "otherwise discriminate" against any person because of race, sex, age, religion, mental disability, learning disability, sexual orientation, or other protected classification; *id.* §§ 46a-71(b) ("[n]o state facility may be used in the furtherance of *any* discrimination") (emphasis supplied) *reprinted at* Pet. App. 57a; *id.* § 46a-76(b) ("No state agency may provide * * * financial assistance to * * * organizations which discriminate"), *reprinted at* Pet. App. 58a-59a.)). Consider the evidence in the Directory of Charitable Organizations for the Connecticut State Employees' Campaign -- a partial listing of such organizations would include the following:

- Noank Baptist Group Homes, Inc.: "Provides a structured home setting for troubled adolescent girls with services to meet their * * * life skills, vocational, and educational needs." *See* C.A. App. at 554.
- Spanish American Development Agency (S.A.D.A): "Provides social services, employment * * * to inner-city low-income people, mostly Hispanics." *Id.* at 552.
- Co-Opportunity: "Empowers low and moderate income individuals to increase their capacity as community stakeholders by providing services in: Housing, Jobs, Training and Economic Development." *Id.* at 557.
- INROADS/Greater Hartford & Springfield, Inc.: "Develops and places talented minority youth in business and industry and prepares them for corporate and community leadership." *Id.* at 557.
- YWCA Family Center – Meriden: "Offers services and advocacy for women and girls and their families, childcare,

youth activities, education, rape crisis assistance, health, employment and leadership." *Id.* at 559.

- Girls Incorporated: "Provides girls an informal curriculum of vocational/recreational programs in areas of . . . career/college planning." *Id.* at 565.
- Connecticut Puerto Rican Forum: "Is an established community based organization providing training and employee services to residents of the Hartford area." *Id.* at 567.

These are doubtless organizations of great value, providing useful services to their targeted populations. But their utility cannot obscure the fact that they choose to provide services to a target population, and exclude others, on the basis of classifications that are facially prohibited by Connecticut law. Worse yet, Connecticut can offer no rational explanation for excusing the use of prohibited classifications in the context of services while prohibiting it in the context of membership. Given the widespread nature of the practices engaged in by other organizations in the Directory one can only be left with the powerful inference that the membership/services dichotomy is a convenient fiction – adopted to ensure that the Boy Scouts are penalized for their viewpoint.

3. Finally, it bears noting that there is, lurking behind the distinctions being drawn, an unstated yet palpable anti-religious component to Connecticut's decision. All Boy Scouts are asked to follow the Scout Oath and Law, which, in turn, require each Scout to do his "duty to God" and be "morally straight." The Oath embodies traditional values, *Dale*, 530 U.S. at 649 and, as a consequence, the Boy Scouts accept neither atheists or agnostics, *see Welsh v. Boy Scouts of America*, 993 F.2d 1267 (CA7 1993), nor avowed homosexuals, *see Dale*, 530 U.S. at 653-54. Thus, at its core, the Boy Scouts' avowed principles rest on a fundamentally theistic (though non-denominational) foundation.[4]

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[4] Indeed, at least one district court recently voided a lease held by the Boy Scouts on public property on the grounds that the granting of the lease was a preferential treatment of a "religious organization"

But this Court has squarely held that religious organizations may not be excluded from programs in which they are otherwise qualified to participate on account of their religious beliefs. *E.g. Rosenberger*, 515 U.S. at 831-32 (finding viewpoint discrimination in exclusion of student religious publication from school funding on basis of publication's religious viewpoint); *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 393-94 (1993) (viewpoint discrimination in exclusion of religious group from use of school facilities). The Boy Scouts' exclusion from the Connecticut workplace charity program is indistinguishable from the impermissible exclusions at issue in *Rosenberger* and *Lamb's Chapel*.

Indeed, the potential scope of the Second Circuit's ruling (as demonstrated by the subsequent *Barnes-Wallace* decision) is chilling. If widely adopted, the court's holding would, in effect, permit governmental discrimination against any organization that acknowledges the existence or importance of a deity. For example, the Preamble to the Legion's National Constitution begins "For God and country * * *." Surely such a statement is not to be construed as a basis for barring the Legion (or similar organizations) from participation in any government benefit. *Compare Regan v. Taxpayers With Representation*, 461 U.S. 540, 551 (1983) (legitimate government policy to preferentially subsidize veterans' organizations). Yet that is the apparent import of the Second Circuit's decision.

III. The Decision Calls Into Question The Practices Of Innumerable Organizations.

As we have said, the membership/services distinction is little more than a convenient legal fiction. But even that fiction is likely to have widespread ramifications. We urge review because the line drawn by the Second Circuit, if sustained,

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in violation of the Establishment Clause. *See Barnes-Wallace v. Boy Scouts of America*, 275 F.Supp.2d 1259 (S.D.Cal. 2003).

would call into question the ability to have access to government benefits, such as the charitable directory at issue in this case, for many heretofore-eligible organizations. A brief survey of publicly available literature strongly suggests that a number of such organizations (all of which appear in the Directory, *see* C.A. App. 546, 548, 555, 556, 563, 567) would now be subject to governmental coercion because of their "discriminatory" membership polices.

Some restrict membership based upon age – a clearly prohibited category. Consider, for example, the Boys and Girls Club of Hartford, Inc. [http://www.bgca.org/ programs/], which limits membership to children ages 6 – 18. Others make membership distinctions based upon gender. For example, the Girl Scout Council of Southwestern Connecticut, Inc. [http://www.gscswct.org/ our%20hist.htm] "is dedicated solely to girls" ages 5 – 17, a double failing as the limitation is both age and gender-based.

Still other organizations have a seemingly religious character to their membership, even more so than the Boy Scouts. The Girl Scout Promise [http://www.girlscouts.org/ program/ promiselaw.html] requires those who are members to promise "to serve God." Meanwhile, Girl Scouts participate in the same religious emblems programs [http://www.praypub.org /main_frameset.htm] that Boy Scouts do.

Still other organizations wear their membership preferences on their shirtsleeves. For example, Nutmeg Big Brothers/Big Sisters, Inc. [http://wwwnutmegbigbrothers bigsisters.com] is "very much in need of male volunteers--- especially African American, West Indian and Latino male volunteers. Needless to say, if you're a woman don't let this discourage you from investigating the possibility of becoming a mentor."

Although others may not make membership criteria explicit, they likely would not tolerate dissenters among the membership or leadership: an anti-Catholic or pro-abortion advocate almost certainly would not be welcome in Catholics for a Free Choice [http://www.cath4choice.org/] and an anti-

feminist probably would not considered for leadership in CWEALF [http://www.cwealf.org/]. Similarly, someone advancing traditional family values would not be welcome as a leader in Stonewall Foundation, Lambda Legal Defense and Education Fund, Hartford Gay and Lesbian Health Collective [http://www.hglhc.org/], or Parents, Families & Friends of Lesbians and Gays ("PFLAG") [http://www.pflag.org/]. Indeed, PFLAG is so adamant that it even has a policy condemning the Boy Scouts. *See* C.A. App. 1030 (reprinting policy).

Are these organizations, as well, now to be investigated? Are their viewpoints to be held up to governmental examination? And, upon review, are they to be excluded from the workplace charitable campaign because they limit their membership in a manner wholly consistent with fundamental First Amendment associational freedoms?

* * * * *

Many years ago, Justice Brandeis noted that the First Amendment constrains governments, preventing them from securing "silence coerced by law – the argument of force in its worst form." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). Connecticut's actions are nothing more than an effort to coerce the Boy Scouts' silence. If Connecticut views the Boy Scouts' beliefs as odious, it is free to say so; it is free to advocate its social view in the marketplace of ideas. But it may not base a decision to oust the Boy Scouts from a generally available government benefit upon the Scouts' disfavored message regarding homosexuality. "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 515 U.S. at 579.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the judgment below reversed.

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No. 03-956

In the Supreme Court of the United States

BOY SCOUTS OF AMERICA, et al.,
Petitioners,

v.

NANCY WYMAN, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICUS CURIAE* THOMAS MORE LAW CENTER IN SUPPORT OF PETITIONERS

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STATEMENT OF IDENTITY AND INTEREST OF THE AMICUS CURIAE[1]

The Thomas More Law Center is a national, not-for-profit public interest law firm based in Ann Arbor, Michigan. The Thomas More Law Center is dedicated to defending and promoting the religious freedom of Christians, time-honored family values, and the sanctity of human life. The Thomas More Law Center accomplishes these goals on behalf of the citizens of the United States through litigation, education, and related activities.

This Court has recognized that litigation by public interest law firms such as the Thomas More Law Center is a form of political expression and association and is often the desirable and orderly way of resolving disputes of broad public interest and obtaining vindication of fundamental rights. Similar to the Boy Scouts, the Thomas More Law Center relies on charitable donations to support its mission.

The Thomas More Law Center has a uniquely Catholic identity as a public interest law firm. As such, its actions are guided by the universal and consistent moral teachings of the Roman Catholic faith, including those that relate to

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[1] This brief is filed with the consent of all parties; copies of their consent letters have been submitted to this Court. Sup. Ct. R. 37.3(a). Additionally, the parties have filed with this Court a blanket consent to the filing of amicus briefs in support of either party. No counsel for a party authored this brief in whole or in part, and no person or entity aside from the Thomas More Law Center, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. R. 37.6. The Thomas More Law Center has no parent corporations and no stock. Sup. Ct. R. 29.6.

homosexuality. As part of its mission, the Thomas More Law Center defends the constitutional rights of freedom of expression, freedom of association, and the free exercise of religion of groups and individuals who oppose homosexuality on moral grounds. The Second Circuit decision in this case, which permits the government to punish an organization based on its opposition to homosexuality, is a profound threat to the constitutional rights of Catholic individuals and organizations, including the constitutional rights of the Thomas More Law Center and its clients.

The Thomas More Law Center appears as amicus curiae in support of Petitioners Boy Scouts of America and Connecticut Rivers Council, Boy Scouts of America and urges this Court to grant their Petition for a Writ of Certiorari.

SUMMARY OF THE ARGUMENT

Less than four years ago, in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), this Court held that the Boy Scouts had a First Amendment right of expressive association to exclude avowed homosexual leaders from its membership. Yet, in order to exercise this right, the State of Connecticut is now forcing the Boy Scouts to pay a price by denying them access to a government benefit for which the Boy Scouts would otherwise qualify. By doing so, Connecticut is placing an unconstitutional condition and burden on the Boy Scouts' fundamental rights. It is hardly a "protected" right if the government is permitted to indirectly punish a person or organization for exercising that right—as Connecticut is doing in this case.

Given the nature of the underlying dispute and the primary reason for Connecticut's discriminatory actions toward the Boy Scouts—namely, the Boy Scouts' membership policies

that embody and preserve its organizational values regarding homosexuality—the Second Circuit's opinion threatens not only the First Amendment right to expressive association, but also the First Amendment right to free exercise of religion. This opinion adversely affects the First Amendment rights of the Boy Scouts, and it has far reaching implications that could threaten the constitutional rights of religious-based organizations that seek to promote and preserve their organizational values, particularly with regard to the issue of homosexuality.

In the final analysis, this Court should grant the Petition for Writ of Certiorari because the Second Circuit opinion conflicts with this Court's decisions that protect the freedom of expressive association and it threatens to open the door to indirect attacks against faith-based organizations that engage in the protected rights of expressive association and the free exercise of religion.

ARGUMENT

The Second Circuit opinion threatens to eviscerate the protections of the First Amendment, particularly for those who engage in expressive association based on moral grounds or deeply-held religious convictions. The implications of this decision reach far beyond the parties involved in the present litigation and compel this Court to grant the Petition for Writ of Certiorari. Indeed, permitting this decision to stand would open the door for other governmental action that seeks to advance a political agenda by forcing those who oppose it to relinquish their constitutionally protected views, beliefs, and practices in exchange for a government benefit that was otherwise available. As this case demonstrates, this is particularly troubling for organizations with traditional moral values, such as the Boy Scouts, and for religious

organizations, such as those that adhere to the teachings of the Roman Catholic faith.

Although the Second Circuit's decision addressed the issues presented in the context of the "First Amendment right of expressive association," Pet. App. 13a, its decision will also adversely affect the right to free exercise of religion, as discussed below, which further commends this case for review.

"Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedom of speech, assembly, and petition." *Healy v. James*, 408 U.S. 169, 181 (1972) (citations omitted). This right includes, for example, the right of the Boy Scouts to exclude avowed homosexual leaders from its membership. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). And this Court has previously held that this right is unconstitutionally burdened by such actions as the denial of official campus recognition, without justification, to college organizations, *see Healy*, 408 U.S. at 181, requiring disclosure of an organization's membership lists even though the state had not taken any direct action to restrict the members' right to associate freely, *see NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958), and conditioning a veterans' parade permit on the inclusion in the parade of persons whose views the veterans did not wish to have identified with their expression, *see Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557 (1995). Here, the State of Connecticut is conditioning the receipt of a government benefit—participation in the State employee charitable campaign, which is a significant source of funding for local Boy Scout councils—on the Boy Scouts'

surrendering of their constitutional right to expressive association. Indeed, the Second Circuit unapologetically recognized and stated that Connecticut is forcing the Boy Scouts to "pay[] a price" for exercising their First Amendment rights. Pet. App. 26a, n.8.

This Court has consistently voided efforts to condition eligibility for access to government benefits on the waiver of fundamental rights. Thus, for example, in *Rutan v. Republican Party of Illinios*, 497 U.S. 62 (1990), this Court struck down a governor's executive order designed to ensure that hiring, rehiring, transfer, and promotion was limited to employees with connections to the Republican Party, specifically rejecting the assertion that conditioning employment decisions on political association was permissible because no employee had a right to the benefits at issue. This Court wrote:

> For at least a quarter-century, this Court has made clear that even though a person has no right to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, *there are some reasons upon which the government many not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interest—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.* This would allow the government to produce a result which it could not command directly.

Id. at 72 (internal quotation, brackets, and citations omitted) (emphasis added); *see Perry v. Sinderman*, 408 U.S. 593, 598

(1972) (noting that government may not condition public employment opportunities on waiver of First Amendment rights); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (withholding passport of Communist Party member violated freedom of association); *Speiser v. Randall*, 357 U.S. 513 (1958) (holding that tax exemption conditioned on applicant's pledge not to advocate forcible overthrow of government was unconstitutional); *see also Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*, 172 F.3d 397, 409 (6th Cir. 1999)(stating that "government may not deny a benefit to a person on a basis that infringes his constitutionally protected interests–especially his interest in freedom of speech.")(internal quotations and citations omitted).

In *Healey v. James*, 408 U.S. 169, 181-82 (1972), this Court acknowledged that the denial of the use of campus facilities, including the use of campus bulletin boards and the school newspaper, were not insubstantial impediments to the associational rights of a college organization. The Court rejected the argument that the campus organization's First Amendment rights were not violated because the denial of official recognition did not deter in any material way the individual advocacy of the member's personal beliefs. *See id.* at 182-83. Moreover, it was of no moment to this Court's analysis that the campus organization members could still meet as a group off campus, distribute written materials off campus, and meet together informally on campus as individuals. *Id.* In fact, this Court "concede[d] . . . that the administration 'ha[d] taken no direct action . . . to restrict the rights of (petitioners) to associate freely . . . .'" *Id.* (quoting *NAACP*, 357 U.S. at 461).

The *Healey* decision makes clear that "the Constitution's protection is not limited to direct interference with

fundamental rights." *Id.* at 183. Acknowledging its holding in *NAACP v. Alabama ex rel. Patterson*, this Court stated,

> The requirement in [*NAACP v. Alabama ex rel. Patterson*] that the NAACP disclose its membership lists was found to be an impermissible, though indirect, infringement of the member's associational rights. Likewise, in this case, the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President's action. We are not free to disregard the practical realities. Mr. Justice Stewart has made the salient point: "Freedom such as these are protected not only against heavy-handed frontal attacks, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960).

Healy, 408 U.S. at 183.

In the present case, the State is denying the Boy Scouts access to critical funds. Without such funds, local councils would be forced to cut Scouting programs to youth. This threatens the continued viability and existence of the Boy Scouts in a far more significant and meaningful way than denying a college organization access to campus meeting facilities, bulletin boards, and the school newspaper. Despite this Court's admonition, the Second Circuit disregarded, *inter alia*, the practical realities of this case, resulting in a decision that is in direct conflict with controlling Supreme Court precedent. This fact alone warrants this Court's review.

Like the right to expressive association, the right to free exercise of religion is made vulnerable to unconstitutional attacks by the Second Circuit's opinion. The Boy Scouts is an

organization that embodies "traditional values," and by reason of these values, it does not accept atheists or agnostics or avowed homosexual leaders. Similar in certain respects to the Boy Scouts, there are many religious organizations that adhere to certain values, which one could describe as "traditional," because of the organization's religious beliefs, practices, customs, and traditions. For example, the universal and consistent moral teaching of the Roman Catholic Church makes clear that homosexuality is objectively disordered and that homosexual persons are called to chastity. According to the Catechism of the Catholic Church, which is the authoritative teaching of the Roman Catholic faith, "homosexual acts" are "acts of grave depravity" and are "intrinsically disordered. . . . Under no circumstances can they be approved." *Catechism of the Catholic Church* ¶ 2357 (2d ed. 1997). Forcing an organization with a Catholic identity to forego its basic values, beliefs, and practices as a condition for the receipt of a government benefit for which it would otherwise be eligible would clearly abridge the organization's First Amendment right to free exercise of religion, not to mention the organization's right to expressive association.

"The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). The First Amendment excludes all "governmental regulation of religious beliefs." *Sherbert v. Verner*, 374 U.S. 398, 402 (1963). As such, "[t]he government may not compel affirmation of religious beliefs, punish the expression of religious doctrine it believes to be false . . . or lend its power to one or the other side in controversies over religious authority or dogma." *Employment Div.*, 494 U.S. at 877 (internal citations omitted). Likewise, the government may not impose special restrictions or disabilities on the basis of

religious beliefs. *See generally McDaniel v. Paty*, 435 U.S. 618 (1978). "The Free Exercise Clause categorically prohibits government from regulating, prohibiting, or rewarding religious beliefs as such." *Id.* at 626; *see also Cantwell v. State of Connecticut*, 310 U.S. 296, 303 (1940) (stating that the Free Exercise Clause embraces two concepts, the freedom to believe and the freedom to act, and that "freedom of conscience . . . cannot be restricted by law"). Indeed, the Free Exercise Clause even forbids "subtle departures from neutrality, and covert suppression of particular religious beliefs." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (internal quotations and citations omitted).

This Court has long held that when the government places its power, prestige, and support "behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

As this Court stated in *City of Hialeah,*

> Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring).

City of Hialeah, 508 U.S. at 534.

This convergence of controlling legal principles under the Free Speech and Free Exercise provisions yields one consistent result. Just as the State cannot require the Boy Scouts to relinquish its right to free speech and association in exchange for a government benefit, so too the State cannot require a Catholic organization, for example, to relinquish its free exercise right as a condition for receipt of a government benefit. However, the Second Circuit's opinion gives government the power to do indirectly that which it cannot do directly—interfere with fundamental rights. This decision threatens to open the flank of organizations that hold moral and religious beliefs that are inconsistent with the prevailing, "politically correct" views of government officials and expose these organizations to indirect attacks against their fundamental rights. As this Court acknowledged in another context, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). As such, no government official, high or petty, can condition the receipt of government benefits on the relinquishment of certain values and beliefs that the government deems "unorthodox."

According to the well-established precedent of this Court, the First Amendment protects the Boy Scouts and other such organizations from indirect as well as direct attacks against their fundamental rights. The Second Circuit's opinion is in direct conflict with this precedent. Therefore, this Court should grant the Petition for Writ of Certiorari.

CONCLUSION

This Court should grant a writ of certiorari in this case for the above-stated reasons, as well as for the reasons set forth in the Petition.

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In The
Supreme Court of the United States

BOY SCOUTS OF AMERICA AND CONNECTICUT RIVERS COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

— v. —

NANCY WYMAN, in her capacity as Comptroller of the State of Connecticut and as a member of the Connecticut State Employee Campaign Committee, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INTEREST OF AMICUS CURIAE

Petitioners Boy Scouts of America and Connecticut Rivers Council, Boy Scouts of America ("Petitioners" or "Boy Scouts") and Respondents Nancy Wyman, in her capacity as Comptroller of the State of Connecticut and as a member of the Connecticut State Employee Campaign Committee, Carol Carney, in her capacity as Chair of the Connecticut State Employee Campaign Committee, and Margaret Diachenko, Richard Emonds, Paluel Flagg, Christine Fortunato, Burton Gold, Carol Guiliano, Carol Hamilton, Marilyn Kaika, Joan Kelly-Coyle, D'Ann Mazzocca, Bernard McLoughlin, Michael Nichols, William Phillie, Cheryl Swain, and Noel Thomas, in their capacities as members of the Connecticut State Employee Campaign Committee (collectively the "Respondents") have each consented to the filing of this amicus curiae brief[1] by the Individual Rights Foundation ("IRF").

The IRF was founded in 1993 and is dedicated to supporting litigation involving civil rights and First Amendment issues and educating the public about the importance of the First Amendment's free speech and associational guarantees. To further its goals, the IRF participates in seminars and other public events, contributes to newsletters, appears in litigation by its general counsel, Manuel S. Klausner, and files amicus curiae

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[1] Counsel of record, Paul A. Hoffman, authored this amicus curiae brief in its entirety, with the assistance of Manuel S. Klausner. No person or entity, outside of amicus curiae, Individual Rights Foundation, its members or its counsel of record, has made a monetary contribution to the preparation or submission of the present amicus curiae brief. The joint written consents of Petitioners and Respondents have been filed with the Clerk of the Court.

briefs in appellate cases involving First Amendment speech and associational rights issues. The IRF seeks to resist attempts from anywhere along the political spectrum to limit public expression because such attempts pose a serious threat both to cultural diversity and to our free form of government.

STATEMENT OF THE CASE

This amicus adopts the Statement of the Case set forth in the Petition for a Writ of Certiorari ("Petition") by Boy Scouts.[2]

SUMMARY OF ARGUMENT

Your amicus respectfully submits that several constitutional errors by the Second Circuit demand this Court's review in order to avoid serious erosion of the freedoms of speech and expressive association:

(1) The Second Circuit's decision in *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003) fundamentally misapprehends and erodes this Court's opinion in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), by erroneously concluding that regulation of the Boy Scouts' leadership role modeling policies is mere conduct which

[2] Numbers preceded by "A." refer to pages in the record before the Court of Appeals for the Second Circuit; numbers preceded by "P." refer to the Petition for a Writ of Certiorari; numbers followed by "a" refer to pages in the bound Appendix submitted with the Petition.

raises lesser First Amendment protection. Thus, *Wyman* erodes *Dale* by denigrating the importance of *expressive role modeling activities as core First Amendment activity* intended to convey messages and values no less vital to Boy Scouts' purposes than its other forms of speech.

(2) The exclusion of Boy Scouts from the Campaign was viewpoint discriminatory and *directly targeted Boy Scouts' expressive association rights* because: (a) homosexual advocacy groups and other groups taking positions on moral issues were permitted to participate without restriction; (b) Boy Scouts showed evidence that they have a reasonable non-discrimination policy, which accepts homosexuals applying for positions not involving transmission of values to youth and excludes homosexuals only from positions where their presence would interfere with the transmission of values; and (c) Connecticut's Gay Rights Law, which was used as a measuring rod to determine what groups could participate in the Campaign forum, was *unconstitutionally interpreted to protect only some viewpoints*, namely those of individuals and "organizations devoted to sexual activities," while excluding the Scouts' role model policy as a viewpoint.

(3) Contrary to this Court's precedents, the Second Circuit in *Wyman* has improperly *constructed a lower-tier First Amendment standard of review* – called viewpoint disparity – contrary to this Court's precedents regarding stricter standards for determining viewpoint discrimination.

ARGUMENT

I. THE SECOND CIRCUIT DECISION IN *WYMAN* ERODES FUNDAMENTAL EXPRESSIVE ASSOCIATION RIGHTS ESTABLISHED BY THIS COURT'S PRIOR CASES BECAUSE IT FAILS TO RECOGNIZE THE IMPORTANCE OF BOY SCOUTS' LEADERSHIP ROLE MODELING POLICIES AS CORE FIRST AMENDMENT EXPRESSIVE ACTIVITY.

The Petition raises an important First Amendment issue on a recently decided case by this Court, i.e., whether the Second Circuit's ruling in *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003) erodes the effect of this Court's decision in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), which recognized Boy Scouts as a primarily expressive association whose Scout leader *role modeling activities constitute core First Amendment activity* expressly intended to convey messages and values important to the association.

Throughout its opinion in *Wyman*, the Second Circuit fails to recognize the core First Amendment expressive activities being undertaken by Boy Scouts' role modeling – implying that, because such expression is transmitted through its membership and employment policies, therefore, it is relegated to some lower-tier form of First Amendment protection. *Wyman*, *supra*, 335 F.3d at 93. Since the exclusion of Boy Scouts from the Campaign is a mere regulation of "membership and employment policies as conduct, not as expression" (*id.*), it is not deserving of the same level of First Amendment scrutiny and the state may "to some extent restrict the message." *Id.* Thus, according to the Second Circuit, Boy Scouts' role modeling activities constitute mere "conduct toward homosexuals"

not deserving of the same protection as First Amendment "views on homosexuality." *Id.* at 98. However, the foregoing conclusions run directly counter to this Court's holdings in *Dale* and other expressive conduct cases.

In *Dale*, this Court rejected the simplistic conduct/speech dichotomy suggested by the Second Circuit in *Wyman* and clearly recognized the inherent transmission of moral teachings and values through, and the important expressive nature of, role modeling.[3] This Court found in *Dale* that "the general mission of the Boy Scouts" is to "instill values" and that Scout leaders do this "both expressly and *by example*." 530 U.S. at 649-50 (emphasis added). "Dale's *presence* in the Boy Scouts would, at the very least, force the organization to *send a message* both to youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior." *Id.* at 653 (emphasis added). This Court further stated:

> "The *presence of an avowed homosexual* and gay rights activist in an assistant scoutmaster's uniform *sends a distinctly different message* from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy. The Boy Scouts has a First Amendment *right to choose to send one message but not the other*." *Id.* at 655-56 (emphasis added).

Since the Boy Scouts' form of expressive role modeling can only be achieved *through* its membership and employment policies, the Second Circuit's failure to recognize

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[3] This Court also recognized role modeling as an important method of transmitting teachings and values in *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

the exercise of core First Amendment rights in *Wyman* leads to a direct infringement and restriction of the Boy Scouts' and other groups' expressive role modeling rights, thereby relegating the right of expressive association to the status a lower-tier right under the First Amendment.

Such infringement, if unchecked, could drastically affect the rights of many expressive associations. For example, expressive activity by such groups as the Salvation Army, Girl Scouts, or Young Women's Christian Association may include appointment of leaders and youth counselors, who often teach more *by their example* than by their teaching. Such forms of expression should not be denied equal access to a forum simply because that form of expression arises out of such association's membership and employment policies.

"Governmental restraint on [speech] need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers." *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974). By limiting the manner in which the membership and employment policies of expressive associations can be exercised, the Second Circuit has improperly attempted to create new limitations under the First Amendment. Such limitations would allow the government, by means of new and expansive interpretations of nondiscrimination laws beyond their original intent, to restrict expressive conduct to orthodox viewpoints. *Texas v. Johnson*, 491 U.S. 397, 418 (1989). However, notwithstanding the well-intentioned purpose behind Connecticut's Gay Rights Law, even the state's interest in preventing discrimination may be questioned "in the marketplace of ideas" and cannot be used to override the supremacy of the First Amendment. *Id.*

Accordingly, this case raises serious issues of state-mandated censorship precisely because of the Boy Scouts' mode of communicating traditional values regarding what is "morally straight" through expressive role modeling. It is a "bedrock principle" of the First Amendment that the government may not regulate expression of an idea "simply because society finds the idea itself offensive or disagreeable." *Id.* at 414. Moreover, First Amendment restrictions on government regulations are "*not dependent on the particular mode in which one chooses to express an idea.*" *Id.* at 416 (emphasis added). Accordingly, the government may not "ensure that a symbol be used to express only one view of that symbol or its referents." *Id.* at 417.

As this Court held in *Dale*, the role of a Scout leader is clearly symbolic in large measure. Boy Scouts seek to control the symbolic messages they send to youth and the public through their unique emphasis on Scout leader role modeling.

Hence, the Second Circuit's failure to recognize the symbolic and expressive nature of Boy Scouts' role modeling results in a state regulation that *limits both the number and type of messages that can be conveyed in its forum* and amounts to a limitation on speech. "To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries." *Texas v. Johnson*, *supra*, 491 U.S. at 417. Thus, when the state seeks, as in this case, to *deny access to a forum only to certain speakers* whose "discriminatory" viewpoints are conveyed through the "medium" of their leadership role modeling policies and not to other speakers whose leadership policies are in line with the state's

viewpoints, there is a great danger of state-mandated censorship.

Moreover, it is precisely in the area of governmental overregulation of expressive conduct that the danger of ideological constraint is high, especially if the nexus between the expressive nature of the activity and the interest being regulated is not well understood. Since Boy Scouts seek to teach their messages and values *by quiet role modeling* and not by boisterous debate, there is a great danger that outsiders (including the state) may misinterpret such a position as mere conduct, as the Second Circuit has done in this case, not core First Amendment expression. However, as explained in *Dale*, this does not mean that such quiet advocacy is not fully worthy of protection under the First Amendment.

Therefore, the Second Circuit's failure to recognize Boy Scouts' expressive association rights, including expressive role modeling, as core First Amendment rights like oral speech, results in viewpoint discrimination. If left intact, *Wyman* threatens to substantially erode and chill the expressive association rights enunciated in *Dale*.

II. THE EXCLUSION OF THE BOY SCOUTS FROM THE CHARITABLE CAMPAIGN WAS VIEWPOINT DISCRIMINATORY BECAUSE SOME VIEWPOINTS REGARDING SEXUAL ORIENTATION WERE ALLOWED IN THE FORUM BUT THE COMMITTEE REFUSED TO PERMIT BOY SCOUTS' VIEWPOINT EXPRESSING A "PREFERENCE FOR HETEROSEXUALITY".

Connecticut's Gay Rights Law purports to protect all varieties of "sexual orientation," including those groups

"having a preference for heterosexuality . . . [or] having a history of such preference or being identified with such preference." Conn. Gen. Stat. § 46a-81a. In *Wyman*, *supra*, Boy Scouts claimed that the foregoing definition of "sexual orientation" protected their participation in the Campaign from viewpoint discrimination because of Boy Scouts' "preference for heterosexuality." 335 F.3d at 98-99. However, both the Committee and the Second Circuit dismissed this claim, concluding that the protection of Connecticut's Gay Rights Law applies only to natural persons and any "organization devoted to sexual activities." *Id.* at 99.

Thus, according to the narrow interpretation employed in *Wyman*, Connecticut's Gay Rights Law, a statute of general application, protects from discrimination only the expressions of individuals and groups "devoted to sexual activities," not groups taking a more traditonal, quiet, role-modeling approach to their sexual orientation.[4] *When such a narrow statutory interpretation is then used as a measuring rod to determine what groups are entitled*

[4] The Second Circuit attempted to justify its narrow interpretation of "sexual orientation" discrimination in *Wyman* by explaining that, if Boy Scouts can claim protection for its "preference for heterosexuality" under the definition section of the Connecticut Gay Rights Law, then any discriminatory organization could do so. *Wyman*, 335 F.3d at 99. However, this argument ignores the fact that Boy Scouts is an expressive association with an established viewpoint and a unique history of expression on this matter, as this Court held in *Dale*, a showing of proof which commercial entities are unable to meet. Thus, by failing to recognize Boy Scouts' expressive association rights in the interpretation of the phrase "preference for heterosexuality," the Committee and the courts below have chosen to construe the Gay Rights Law in a manner which runs afoul of the First Amendment.

to the benefits of participating in a forum, such as the Campaign in this case, *constitutional issues are clearly raised*. Therefore, the Petition squarely raises the issue of whether a Connecticut law of general application may be constitutionally applied to exclude the Boy Scouts from the benefits of the Campaign on the basis of viewpoint.

State refusal to recognize the First Amendment viewpoints of groups engaging in quiet advocacy, or even non-advocacy, is not new. This Court has reversed lower court rulings failing to recognize that even groups not having a coherent message or membership are entitled to protection of their "official" viewpoint. *See, e.g., Dale, supra*, 530 U.S. at 655-56 ("fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection"); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) (purpose of St. Patrick's Day parade was not to espouse any views about sexual orientation, but parade organizers still had First Amendment rights worthy of protection). Thus, the danger of viewpoint discrimination is only heightened where a "viewpoint" is quiet, somewhat neutral, or not well-recognized.

In assessing whether a non-public forum such as a government-run charitable campaign is being administered in a viewpoint discriminatory fashion, the First Amendment will not tolerate a government regulation which "is in reality a facade for viewpoint-based discrimination." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985).

This Court has found viewpoint discrimination where expression regarding a given subject matter is allowed in a

forum, but the refusal to participate in the forum extends only to those expressions communicating a disfavored viewpoint, such as speech having "a religious perspective" on an otherwise forum-permissible subject matter, *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), or a request for funding by an otherwise qualified student publication solely because of its religious perspective in a university forum purporting to fund a wide diversity of publications, *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995), or instruction in character and morals "from a religious viewpoint" in a limited public forum otherwise permitting instruction in character and morals. *Good News Club v. Milford Central School*, 533 U.S. 98, 109 (2001).

In the present case, the record below as well as the Second Circuit's opinion make clear that Boy Scouts has been *selected for disfavored treatment based solely on the exercise of its expressive leadership policy and viewpoint* regarding "sexual orientation" and "morals." First, the record clearly shows that the Committee allows unfettered participation in the Campaign by *pro-homosexual* advocacy and support groups, such as the Hartford Gay and Lesbian Health Collective; the Stonewall Foundation; Parents, Families and Friends of Lesbians and Gays; and Lambda Legal Defense and Education Fund. (A. 27, A. 548, A. 567, A. 672, A. 709, and A. 1030.) Other organizations expressing "moral viewpoints" were also allowed to participate in the Campaign, including Catholics for a Free Choice (A. 546, A. 669) and Girl Scout Council of Southwestern Connecticut, Inc. (A. 683, A. 687, A. 704.) Thus, expression of viewpoints regarding "sexual orientation" and "morals" is clearly an included subject matter in the Campaign forum.

Second, notwithstanding such unhindered participation by pro-homosexual advocacy groups and other groups expressing viewpoints on "moral issues," the Second Circuit concedes in *Wyman* that the decision to exclude the Boy Scouts from the Campaign was *based in part on the Boy Scouts' exercise of its constitutional right* to engage in role modeling by excluding gay activists from leadership positions, notwithstanding that such expression is "constitutionally protected." 335 F.3d at 91.

Third, Boy Scouts showed the Committee evidence that its non-discrimination policy denies positions to avowed homosexuals ***only*** for positions involving transmission of values to youth, but expressly allows known or avowed homosexuals to be employed in positions not involving transmission of values to youth. *Id.* at 85. Thus, the Boy Scouts' *non-discrimination policy is no broader than the constitutionally-upheld standards* for expressive association in *Dale*. Therefore, the Committee's exclusion of Boy Scouts from the benefits of the forum *directly targeted* expressive association rights.

Fourth, the Second Circuit's unnecessarily narrow construction of the Gay Rights Law as protecting only the expressive activities of individuals and groups "devoted to sexual activities" (*id.* at 99), and not the expressive activities of quiet advocates like the Boy Scouts whose "sexual orientation" viewpoint involves a "preference for heterosexuality," further suggests a blatantly viewpoint discriminatory application of the Gay Rights Law by the Committee.[5]

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[5] Other facts suggesting that the Committee's decision was not viewpoint neutral include: (1) Boy Scouts' unrestricted participation in

(Continued on following page)

Finally, the Second Circuit concedes that exclusion of Boy Scouts from the Campaign has an "adverse impact" on "attempts to *voice* anti-homosexual viewpoints through the medium of expressive association" (*id.* at 93), that such regulation will admittedly, to some degree, *"restrict the message"*(*id.*), and that Boy Scouts *"pays a price* for doing so." *Id.* at 95 n.8. (Emphasis added.)

Under this Court's relevant jurisprudence, such *extraction of a price* for expression of a viewpoint on an otherwise allowed subject matter within the forum *clearly violates the First Amendment*. "[T]he government offends the First Amendment when it imposes financial burdens on certain speakers based on the content of their expression." *Rosenberger*, *supra*, 515 U.S. at 828 (citing *Simon & Schuster, Inc. v. Member of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991)). Thus, the First Amendment is clearly violated in this case because access is being denied to a lucrative charitable campaign in order to "suppress the [allegedly anti-homosexual] point of view" of the Boy Scouts "on an otherwise includible subject" (i.e., sexual orientation). *Cornelius*, *supra*, 473 U.S. at 806. Accordingly, exclusion of the Boy Scouts from a state-created forum based on its unique viewpoint expressed through its leadership role-modeling policy is no more permissible than exclusion of a unique viewpoint (i.e., religious)

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the Campaign for approximately 30 years, including over 9 years after passage of the Connecticut Gay Rights Law; (2) prior to filing the Boy Scouts' complaint, no other charitable organizations were excluded from the 2000 Campaign for failure to comply with the non-discrimination policy (A. 1112-22); and (3) denial of Boy Scouts' participation within several months of the decision in *Dale v. Boy Scouts of America*, 160 N.J. 562, 734 A.2d 1196 (1999).

expressed through moral instruction. *Good News Club*, *supra*, 533 U.S. at 111.

Thus, this case is really not about discrimination against homosexuals at all, as the Committee believes, but *is about viewpoint discrimination against politically incorrect organizations* which engage in speech or other kinds of constitutionally-protected expressive conduct which is contrary to evolving notions of morally and politically correct behavior. What the State of Connecticut is really saying in this case is that it will not allow certain varieties of expression in its Campaign. But such a practice is the very *essence* of viewpoint discrimination. By disallowing discriminatory viewpoints in its fund-raising Campaign, *the state is actually practicing another form of discrimination – viewpoint discrimination – something which it is clearly forbidden to do* under this Court's jurisprudence. *See, e.g., Rosenberger*, *supra*, 515 U.S. at 828 ("[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys").

The constitutional principles at stake in *Wyman* are of no small moment because its holding has *negative implications for a broad variety of expressive associations*, including the important rights of gay and lesbian associations and other associations having a moral viewpoint. Based on the Second Circuit's reasoning, a gay rights organization could not limit its leadership positions to prominent gay activists without suffering financially. Furthermore, Catholic fraternal organizations, such as Opus Dei, which practice and advocate traditional celibacy could be subjected to potential fund-raising dilemmas, solely because of the uniform practice of their unique moral viewpoint. Other ecclesiastically-based organizations could also be

excluded from government-run charitable campaigns because they support limitations on ordination in their hierarchy to men, or non-homosexuals, or even to believers.[6]

Thus, the Second Circuit's holding in *Wyman* has vast negative implications for equality of expression and participation in state-sponsored fora by associations with unique moral viewpoints as expressed through their leadership and membership policies. Therefore, the Second Circuit's ruling requires review because it directly conflicts with this Court's First Amendment jurisprudence in the area of viewpoint discrimination.

III. THE SECOND CIRCUIT IN *WYMAN* HAS ERRONEOUSLY ATTEMPTED TO IMPOSE A WHOLLY NEW STANDARD OF REVIEW – CALLED VIEWPOINT DISPARITY – CONTRARY TO THIS COURT'S PRECEDENTS REGARDING VIEWPOINT DISCRIMINATION.

The Second Circuit's decision in *Wyman* also demands review because it attempts to erect a new lower-tier First Amendment standard of review – called viewpoint disparity – for viewpoints expressed through leadership role-modeling policies than for other forms of expression. The Second Circuit admits that Connecticut's Gay Rights Law

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[6] The Second Circuit's ruling that discriminatory expressive leadership policies deserve a lower-tier standard of review may directly lead to another anomaly: some Episcopalian-based organizations may be barred from participation in some government-sponsored fora, but not other Episcopalian groups, depending on whether they accept the ordination of gay bishops.

has a "differential adverse impact on attempts to voice anti-homosexual viewpoints through the medium of expressive association" that "will to some extent restrict the message." *Wyman*, *supra*, 335 F.3d at 93. However, the Second Circuit suggests that laws not targeting, but negatively impacting the message of, such expression merely constitute "viewpoint disparity" which does not deserve the same level of constitutional scrutiny as "purposeful" viewpoint discrimination. *Id.* at 93-94. However, the Second Circuit's attempt to carve out a new lower-level tier of First Amendment protection finds no justification in this Court's jurisprudence.

The prior cases of this Court have never justified laws that, either on their face or as applied, condone viewpoint discrimination, so that, as *Wyman* concedes here, the message of some viewpoints are restricted but others are not. Footnote 8 of the *Wyman* opinion is particularly revealing of the egregious form of viewpoint discrimination being rationalized by the Second Circuit in this case:

> "[A] law that has a predictably *adverse impact on certain viewpoints* may be cold comfort to those *whose expression the law, in practice, limits*. But that *is precisely the result that follows* from the Supreme Court's treating more restrictive measures, like those considered in *Dale*, differently from the lesser harm of removal from a nonpublic forum, like that at stake in the instant case." *Id.* at 95 n.8 (emphasis added).

However, the constitutional interest at stake in *Dale* was no different than the one here. Boy Scouts' right of expressive association as expressed through its leadership role modeling policies in *Dale* is the same right at stake in the present case. Moreover, contrary to the Second Circuit's suggestion above, there is no justification for a more

deferential standard of review for "viewpoint discrimination" analysis in cases involving a non-public forum as opposed to a public or limited public forum. The constitutional standard is the same in all such cases – *viewpoint discrimination is presumptively impermissible in any forum* when directed against speech otherwise permitted within the subject matter limitations of the forum. *Rosenberger, supra*, 515 U.S. at 830; *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 46 (1983). Accordingly, the Second Circuit is improperly attempting to erect a new analysis in non-public forum cases, directly contrary to this Court's precedents.

Nor would it be desirable to establish a multiple-tier approach[7] to different expressive rights under the First Amendment merely because of the form in which they are communicated. Such an idea has been firmly rejected by this Court. "[T]he government may not prohibit expression simply because it disagrees with its message, [which] is not dependent on the particular mode in which one chooses to express an idea." *Texas v. Johnson, supra*, 491 U.S. at 416.

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[7] Attempts to devalue and categorize certain whole classes of recognized First Amendment expression (i.e., expressive conduct or expressive association) as less intrinsically valuable, and thereby less impervious to viewpoint discriminatory regulations, than other forms of expression, such as oral speech, leads to a dangerous and unpredictable slippery slope. By applying a lower standard of review for such forms of viewpoint discrimination, the Second Circuit has attached a new Orwellian twist to the First Amendment, implying that "some [First Amendment] animals are more equal than others." George Orwell, *Animal Farm* 133 (Signet Classic 1996) (1946).

Accordingly, the differential treatment of the Boy Scouts' viewpoint, as expressed through its expressive leadership policies, cannot be justified merely because the restriction sought to be imposed here – barring the Boy Scouts from participation in a non-public forum open to over 900 other private charitable organizations – is allegedly not as draconian as the outright prohibition of the leadership policies sought by the state in *Dale*.

Finally, allowing the Second Circuit's decision to stand is likely to further erode the rights of all expressive associations by permitting use, in an unintended manner, of anti-discrimination laws of general application to deny, on a non-neutral basis, forum participation by disfavored expressive assocations[8] in a large variety of contexts. This holds the potential for fundamentally eroding established First Amendment rights of such associations by lowering the constitutional scrutiny of viewpoint discriminatory efforts to economically weaken them. *Cornelius*, *supra*, 473 U.S. at 799 ("without the funds obtained from solicitation in various fora, the organization's continuing ability to

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[8] "Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of 'free speech.'" *Perry Educ. Ass'n.*, *supra*, 460 U.S. at 62 (Brennan, J., dissenting). Thus, this Court's development of the First Amendment doctrine of "viewpoint neutrality" is one of the strongest bulwarks against attempts from historical factions across the ideological spectrum to shackle opponents by restraining attempts to speak, worship, associate, fund raise, or engage in numerous other expressive activities vital to a robust, open, and free pluralistic society. By contrast, limitations on some components of a group's First Amendment rights, such as the expressive activity and fund raising rights at stake in this case, dangerously lead away from a free and diverse society.

communicate its ideas and goals may be jeopardized"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (First Amendment is offended by giving "one side of a debatable public question an advantage in expressing its views"). Such an attempt to unlevel the ideological playing field is therefore a true threat to core First Amendment interests.

CONCLUSION

This amicus respectfully submits that this Court should overturn efforts from any part of the political spectrum to compel ideological orthodoxy or to punish ideological non-conformity, especially when it is directed against expressive associations. Far from vindicating the rights of homosexuals, a ruling which undermines the right of expressive association in this case may unwittingly lay the groundwork for denial of First Amendment rights of all citizens, including the First Amendment rights of homosexuals.

Granting certiorari in this case and reversing the ruling below will not lead to a general undermining of legal protections for gays and lesbians, contrary to some predictions three years ago when this Court issued its opinion in *Dale*. Hotels, restaurants, and other commercial establishments rarely, if ever, exist for an expressive purpose. Unlike Boy Scouts, the purpose of most commercial establishments is to make a profit, not a moral point. It simply strains credibility to suggest that most, or even many, businesses exist to teach their customers, clients, or membership the virtues of traditional family values. Therefore, upholding the right of expressive associations

in this case will not undermine the exercise of legitimate state efforts to protect the civil rights of minorities through application of anti-discrimination laws.

However, by refusing to grant the Petition in this case, the freedom of expressive associations holding unique viewpoints to exercise their constitutional rights and to compete on an equal, viewpoint-neutral basis for funding with other associations will be substantially chilled. Therefore, your amicus respectfully urges this Court to grant the Petition in this case in order to avoid erosion of important First Amendment rights of all expressive associations.

Respectfully submitted,

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No. 03-956

In the

Supreme Court of the United States

BOY SCOUTS OF AMERICA AND CONNECTICUT RIVERS COUNCIL, BOY SCOUTS OF AMERICA,
Petitioners,

v.

NANCY WYMAN, in her capacity as Comptroller of the State of Connecticut and as a member of the Connecticut State Employee Campaign Committee, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICI CURIAE OF PACIFIC LEGAL FOUNDATION, TONATIUH ALVAREZ, THE CLAREMONT INSTITUTE, AND THE VETERANS OF FOREIGN WARS OF THE UNITED STATES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Boy Scout leader-selection policies reflect the Scouts' constitutionally protected principles. May a government exact a price for adherence to those principles, by excluding the Scouts from a generally available government benefit, subsidy, program or facility unless they surrender their principles and abandon policies that express those principles?

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INTEREST OF AMICI CURIAE

Pacific Legal Foundation, Tonatiuh Alvarez, The Claremont Institute for the Study of Statesmanship and Political Philosophy, and the Veterans of Foreign Wars of the United States respectfully submit this brief amici curiae in support of the Petition for Writ of Certiorari.[1]

Amici file this brief to assist the consideration of important constitutional issues of free speech and expressive association.

Amicus Pacific Legal Foundation (PLF) is a nonprofit public interest law foundation headquartered in Sacramento, California, with a commitment to First Amendment freedoms. PLF submitted friend of the court briefs in defense of expressive and associational rights in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Boy Scouts of America v. Wyman*, 335 F.3d 80 (2d Cir. 2003); *Boy Scouts of America v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001); and *Boy Scouts of America v. District of Columbia Comm'n on Human Rights*, 809 A.2d 1192 (D.D.C. 2002). PLF attorneys represent Tonatiuh Alvarez in his capacity as one of the petitioners in *Evans v. City of Berkeley*, 127 Cal. Rptr. 2d 696 (2002), *review granted*, California Supreme Court No. S112621 (Mar. 6, 2003) (concerning a punitive city policy directed at the *Evans* petitioners because of their affiliation with the Boy Scouts of America, (*see infra*)).

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[1] All parties have consented to the filing of this brief. Letters evidencing such consent have been lodged with the Clerk of the Court.

Amici Curiae affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

PLF also supports robust enforcement of the unconstitutional conditions doctrine (one of the legal issues in the case at bar); PLF attorneys were counsel for petitioners in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), a landmark application of unconstitutional conditions analysis.

Amicus Tonatiuh Alvarez, a resident of Oakland, California, is one of the petitioners in *Evans, supra.* Currently pending before the California Supreme Court, *Evans* challenges a discriminatory berth fee imposed on the *Evans* petitioners at the City of Berkeley's Marina because of petitioners' status as Sea Scouts, and hence their affiliation with the Boy Scouts of America. The California Court of Appeal's rationale for upholding this punitive berth fee included arguments (*see, e.g.*, 127 Cal. Rptr. 2d at 703-05) that broadly parallel the Second Circuit's reasoning in permitting Connecticut to expel the Boy Scouts from its state employee charity campaign while allowing other nonprofits, with views more acceptable to government officialdom, to continue in the program.

Amicus The Claremont Institute for the Study of Statesmanship and Political Philosophy is a nonprofit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life." The Institute pursues its mission through academic research, publications, scholarly conferences, and the selective appearance as amicus curiae in cases of constitutional significance. Of particular relevance here, the Institute has published extensively about the foundations of representative government and the constitutional protections of speech and association that are necessary to protect those foundations, including a monograph entitled "On the Front Lines of the Culture War: Recent Attacks on the Boy Scouts." In addition, the Claremont Institute, through its in-house public interest law unit, The Center for Constitutional Jurisprudence, has participated as an amicus curiae before this

Court in *Dale, supra,* and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

Amicus Veterans of Foreign Wars of the United States (VFW) is a federally chartered voluntary membership corporation with a membership of more than 1.8 million veterans, most of whom are also members of local posts, which are themselves membership corporations or unincorporated associations. In addition to serving the interests of America's veterans through its Veterans Service, Legislative Service, and National Security programs, VFW is vitally interested in youth and community service programs, and many local posts and members work with local Boy Scout organizations to conduct activities that benefit the whole community. More importantly, VFW and its members are very interested in securing rights protected by the Constitution to take firm, if sometimes unpopular, positions on important social, political, religious, and moral issues, and associate with others of like mind, without fear of government retaliation or discrimination.

WHY THE WRIT SHOULD BE GRANTED

I

GOVERNMENT MAY NOT PENALIZE PRIVATE EXPRESSIVE ORGANIZATIONS FOR THEIR BELIEFS, EVEN IF THE PENALTY IS ACCOMPLISHED THROUGH AN OSTENSIBLY "NEUTRAL" "ANTIDISCRIMINATION" LAW

In *Dale,* this Court recognized 1) that the Boy Scouts of America is an expressive organization; 2) that criteria for selecting volunteer adult Scout leaders reflect core Scouting beliefs; and 3) that the First Amendment therefore bars government from compelling the Scouts to depart from their beliefs by abandoning their traditional selection criteria for adult leaders. 530 U.S. at 650-52.

The question raised by this case follows naturally from that in *Dale*: If government may not *force* the Scouts to

abandon their principles, may it *penalize or discriminate against* the Scouts because of those principles? The precedents of this Court answer, unambiguously, No. The ruling below answered, Yes. Therefore, a writ of certiorari should be granted.

Connecticut has expelled the Boy Scouts from a state charity fundraising program, while allowing hundreds of other nonprofit organizations to continue in the program, because of Scout leader-selection criteria that *Dale* recognized to be expressive in nature. The Scouts have been ousted because they embrace, and organize themselves in accordance with, convictions that state officials do not find acceptable. By approving the expulsion of the Scouts, the decision below violates this Court's teaching that government may not impose a price or visit punishment, retaliation or discrimination on private expressive organizations because of their viewpoints or exercise of First Amendment freedom of expressive association. Review by this Court is therefore appropriate, pursuant to Supreme Court Rule 10(c).

A. Even if Connecticut's Antidiscrimination Law Were Neutral in Intent, It Could not Constitutionally Exclude the Boy Scouts from a Government Program for Which They Are Otherwise Eligible

As Petitioners set out (Petition at 16-19), *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), and its progeny bar government from excluding an otherwise-qualified expressive group from a government program on the basis of viewpoint.

Amici wish to reinforce this point by challenging the assertion of the court below that viewpoint-based exclusion is permissible when it is merely the incidental result of enforcing a "neutral," generally applicable law. Specifically, the court below stated that

> [w]here a law is on its face viewpoint neutral . . . but has a differential impact among viewpoints . . . [it] is viewpoint discriminatory only if *its purpose* is to impose a differential adverse impact upon a viewpoint.

Boy Scouts of America v. Wyman, 335 F.3d at 94 (citations omitted) (emphasis added).

This Court's precedents declare otherwise. In cases analogous to the one at bar, application of neutral statutes has been enjoined where First Amendment rights would be infringed. For instance, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), prohibited the application of a public accommodations law so as to condition a permit for a Saint Patrick's Day Parade on the organizers' agreement to admit a gay and lesbian unit into the procession. The Court "was fully cognizant that the [public accommodations law] . . . did not target expression and was, itself, content-neutral," but, as applied, the law infringed on the expressive freedoms of the parade organizers, who objected to including a gay and lesbian message. Laurence H. Tribe, *Disentangling Symmetries: Speech, Association, Parenthood*, 29 Pepp. L. Rev. 641, 650 (2001) (citing *Hurley*, 515 U.S. at 572).

Likewise, *Dale* involved New Jersey's application to the Boy Scouts of a neutral public accommodations law. There was nothing on the face of the statute or in its legislative rationale indicating that it had been conceived with a purpose to suppress any particular viewpoint, or to target the Boy Scouts. Indeed, the "findings and declarations" accompanying the law declared that its purpose was purely protective—to shield the state's citizens from "economic loss; time loss; physical stress" and other hardships that could flow from the discrimination prohibited by the act. N.J. Stat. Ann. § 10:5-3. In other words, it paralleled what the court below found to be the purpose of the

Connecticut antidiscrimination law at issue in this case: "[T]o protect persons from the more immediate economic and social harms of discrimination." *Wyman*, 335 F.3d at 94.

Yet a neutral, nonpunitive purpose was not enough to permit the New Jersey Law Against Discrimination to be imposed so as to restrict the First Amendment rights of the Scouts. Professor Tribe notes how, in *Dale*, "a neutral rule of general applicability . . . [gave] way to [a] First Amendment objection . . . simply because the rule has the incidental effect, as applied to a particular group, of interfering with its freedom of expression." Tribe, *supra*, at 650.

To be sure, this outcome might seem inconsistent with the precedents cited by the court below (*Wyman*, 335 F.3d at 94), where neutral laws trumped constitutional claims made by parties to which the laws had been applied. But there is a crucial difference: *Dale* and *Hurley*, as Professor Tribe observes, involved *antidiscrimination* statutes (Tribe, *id.*, at 650)—as, of course, the present case does as well. When an antidiscrimination law is being applied, exemptions are in order for parties whose First Amendment rights would be incidentally infringed, because "one man's discrimination is another's expression of a moral view." Tribe, *supra*, at 651. In other words, the application of an antidiscrimination law *cannot be neutral* where what the state is calling "discrimination" is understood by the private expressive organization to be something altogether different—i.e., a sharing of certain core beliefs as articles of membership. Such cases, where the state brands a private group's belief-based membership policies as "discrimination," amount to a duel of definitions,

> a direct clash of competing images of "the good life." And, in such a clash, the teaching of the First Amendment has long been that the state loses.

Tribe, *supra*, at 651-52.

Expressive association is a fundamental freedom for which the pejorative term, "discrimination," should not be ritually applied as a synonym. After all, to the degree that any private organization, whatever its philosophical complexion, makes shared convictions a condition of belonging, it excludes those who do not hold those tenets, and therefore it could be called a "discriminator." But to use that epithet in such a context devalues and denigrates the freedom of expressive association. The importance of associational freedom cannot be overstated: America's rich web of private associations nourishes our common life and safeguards our freedoms. Besides serving as outposts of philanthropy and social service, private associations are the life force of American diversity and pluralism. They ensure that there are institutions other than the state to which individuals look for philosophical kinship and tutelage. This is why de Tocqueville celebrated America's profusion of private associations not merely as a force for social betterment but also as a "dike to hold back tyranny of whatever sort." Alexis de Tocqueville, *Democracy in America* 177 (J.P. Mayer and Max Lerner, eds., Harper & Row, 1966).

Unfortunately, the ruling below includes rhetoric echoing the myopic perspective that reflexively equates the exercise of associational rights with "discrimination." Thus, the court describes the Scouts as "anti-homosexual." *Wyman*, 335 F.3d at 86. This disparaging term cannot be squared with the Scout Law and Scout Oath, which pledge respectful treatment toward all people. Indeed, the dissenters in *Dale* made much of the fact that the Boy Scouts in their formal literature do not voice hostility to homosexuals (530 U.S. at 660)—as if one has to be negative toward others, and must loudly snarl that negativity, as a condition of claiming First Amendment associational liberties! Professor Tribe has identified, in the Boy Scout Handbook, the quiet statements of belief that were ultimately at issue in *Dale*—and they are about positive aspirations, not enmity toward others:

> The Boy Scouts, as their pre-litigation literature makes clear, are dedicated to teaching that the good life is one that foreswears promiscuity, practices sexual abstinence until marriage, respects and protects the young woman who is the object of the scout's romantic and lustful impulses, and looks forward to the ultimate satisfaction of fathering children.

Tribe, *supra*, at 649 (citing The Boy Scout Handbook (10th ed. 1990)).

Connecticut cannot be allowed to redefine the Scouts' constitutionally protected expressive association as "discrimination" that subjects the Scouts to legal disabilities. When a neutral "antidiscrimination" law is applied against private policies that are grounded in expression protected by the First Amendment, the statute becomes, in that application, not an "antidiscrimination" law but an "anti-First Amendment" law. This is why application of such laws against protected expression was enjoined in *Hurley* and *Dale*—and this is why a writ of certiorari should be granted here.

B. The Constitution Bars "Indirect" Penalties for the Exercise of First Amendment Rights as Much as Direct Proscription of Those Rights

The court below (*Wyman*, 335 F.3d at 91) posits a distinction between "direct," "immediate" burdens on First Amendment rights—such as New Jersey's decree, in *Dale*, that the Scouts abandon their belief-based membership policies—and Connecticut's "conditioned exclusion" of the Scouts from its charity fundraising program, a policy which, as the court puts it, "does not rise to the level of compulsion."

From the standpoint of the Constitution, this is a distinction without a difference. This Court's precedents establish that *penalizing* the exercise of First Amendment rights —for instance, by excluding an organization from a generally

available government program, subsidy, or facility on viewpoint grounds—is as impermissible as *outlawing* the exercise of First Amendment rights.

Thus, in *Rosenberger*, 515 U.S. at 829, this Court invalidated a public university's denial of subsidies to a student journal expressing religious viewpoints at the same time that the university was providing subsidies to journals with other viewpoints. The university's policy did not "rise to the level of compulsion" in the sense of an outright prohibition of the religious journal or its message. But the unequal treatment—the withholding of generally available funds—was still unconstitutional. It "offend[ed] the First Amendment when [the University of Virginia] impos[ed] financial burdens . . . based on the content of [the religious journal's] expression." 515 U.S. at 828 (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991)). In the same way, Connecticut offends the First Amendment when it imposes a financial burden on the Boy Scouts by excluding them from a fundraising program that remains open to organizations whose viewpoints are more acceptable to officialdom.

Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993), also contradicts the court below. *Lamb's Chapel* overturned a school district's refusal to allow a church to show a film with a religious viewpoint on school grounds that were open to community groups with other viewpoints. *Lamb's Chapel* teaches that the First Amendment bars government not only from *prohibiting* free speech, but also from "*discriminat*[*ing*] *against* speech on the basis of its viewpoint." *Rosenberger*, 515 U.S. at 829 (emphasis added) (citing *Lamb's Chapel*, 508 U.S. at 392-93). By excluding the Boy Scouts from a public program that remains open to nonprofits with viewpoints more acceptable to government, Connecticut is "discriminat[ing] against speech on the basis of

its viewpoint"—something that is not allowed even if it does not "rise to the level of compulsion."

The teaching that "indirect" assaults on constitutional rights are no more allowable than "direct," "immediate" infringements is distilled in the doctrine of unconstitutional conditions. Conditioning a government benefit (such as access to a government charity fundraising program) on an expressive organization's agreement to surrender constitutional rights, is a form of pressure that is constitutionally indistinguishable from compulsion. Hence, "[t]he unconstitutional conditions doctrine prevents the government from penalizing those who exercise their constitutional rights by withholding a benefit that would otherwise be available." Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, 796 (2d ed., 2002) (citations omitted).

In *Nollan v. California Coastal Commission*, this Court employed unconstitutional conditions analysis in affirming the petitioners' right not to have private property taken by the state without the compensation guaranteed by the Fifth Amendment.

Nollan held that the Coastal Commission acted unconstitutionally when it refused to issue a building permit to the Nollans unless they agreed to grant an unrelated public easement on their property. 483 U.S. at 836. *Dolan v. City of Tigard*, which built on *Nollan*, made the reliance on the unconstitutional conditions doctrine even more explicit:

> Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government

> where the benefit sought has little or no relationship to the property.

512 U.S. 374, 385 (1994).

Just as conditioning a benefit on the relinquishment of rights is prohibited in the realm of the Fifth Amendment, so it is barred as a device to undermine First Amendment freedoms. Indeed, the principle that government "'may not deny a benefit to a person on a basis that infringes his constitutionally protected interests'" is "*especially*" true where "'his interest [is] in freedom of speech.'" *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484; 513 (1996) (citation omitted) (emphasis added). Connecticut's application of its antidiscrimination law to the Scouts must be disallowed because it presents the classic unconstitutional-conditions scenario in the First Amendment context: The state withholds the benefit of a fundraising program that is available to other nonprofit organizations, unless the Scouts abandon leadership policies that embody their core principles. Connecticut is attempting to do indirectly what *Dale* said it could not do directly: compel the Boy Scouts to abandon a basic belief and a policy derived from it.

The court below suggests that the doctrine of unconstitutional conditions does not extend to First Amendment *expressive association*; the court contends that in this particular context, "conditioned exclusion" of an expressive organization is permissible when it is the result of a viewpoint-neutral and reasonable law. *Wyman*, 335 F.3d at 91. *Hurley*, however, teaches the opposite. *Hurley* establishes that an antidiscrimination law, even if facially neutral, may not require an expressive organization to relinquish its beliefs on pain of being denied a government benefit for which it is otherwise eligible (such as a parade permit).

This Court in *Dolan* insisted that property rights are not to be treated as a "poor relation" to First Amendment rights. 512 U.S. at 392. Ironically, the court below would treat First

Amendment rights as a "poor relation" by allowing the Scouts' expressive associational rights to be subjected to the sort of carrot-and-stick unconstitutional condition that was disallowed, in *Nollan* and *Dolan*, when the target was property rights.

The crux of this case is revealed in a telling admission by the court below: The Scouts are being made to "pay[] a price" for "exercising . . . First Amendment rights." 335 F.3d at 95 n.8. The court's candor should be fatal to Connecticut's case. As *Rosenberger* ruled, government may not impose "financial burdens . . . based on the content of [an organization's] expression." 515 U.S. at 828 (citations omitted). Because the court below gave its approval to an assault on First Amendment rights that forces the Scouts to "pay a price" for their freedoms, and because this assault is no less impermissible for being "indirect," a writ of certiorari should be granted.

II

A RECURRING ISSUE OF NATIONAL IMPORTANCE IS PRESENTED IN THIS CASE

Dale is one of the seminal civil rights cases of the last 100 years, because it rejected the ominous idea that government may compel private expressive organizations to abandon their beliefs and belief-based membership policies. If the Boy Scouts had been forced to exchange their creed and membership rules for a belief system scripted by the state, the implications for expressive organizations across the philosophical spectrum would have been frightening. Writing in a pre-*Dale* case, California Supreme Court Justice Kennard articulated the peril: If the right of expressive association is denied the Scouts, "[c]ould the NAACP be compelled to accept as a member a Ku Klux Klansman? Could B'nai B'rith be required to admit an anti-Semite?" *Curran v. Mount Diablo Council of the Boy Scouts of America*, 952 P.2d 218, 257 (Cal. 1998) (Kennard, J., concurring).

Alarmingly, in the more than three years since *Dale* was handed down, a number of government entities, in various parts of the country, have put their energies into schemes to subvert it. Connecticut is not alone in trying to muscle the Scouts into relinquishing freedoms that *Dale* recognized as protected by the First Amendment. Among other examples of such unconstitutional armtwisting:

- A few months after *Dale* was issued, the school board of Broward County, Florida voted to prohibit the local Scouts from further use of school facilities after hours—while continuing to allow other private groups to meet on school premises. Notably, the school board acted in furtherance of an ostensibly "neutral" antidiscrimination rule. *Boy Scouts of America v. Till,* 136 F. Supp. 2d at 1297. The district court issued a preliminary injunction, holding that the School Board could not "punish [the Scouts] for [the Scouts'] own message." *Id.* at 1308. Citing *Dale* for the principle that the Scouts have a First Amendment right to their beliefs (*id.*), the court informed the school district that "[o]nce the state has opened a limited public forum, it may not . . . discriminate against speech on the basis of its viewpoint." *Id.* (citing *Lamb's Chapel*, 508 U.S. at 392-93).

- In June, 2001, the District of Columbia Human Rights Commission indulged in perhaps the most audacious nose-thumbing at *Dale* to date. The Commission demanded that the local Scouts readmit two men as adult members who had been dismissed because they were acknowledged homosexuals. *Boy Scouts of America v. District of Columbia Comm'n on Human Rights*, 809 A.2d at 1195-97. The Commission's decree mirrored the New Jersey Supreme Court's order reinstating a homosexual Scout leader, in the decision that was overruled by *Dale*, 530 U.S. at 636. The District of Columbia Court of Appeals reversed, pointing out that the Commission's action could not "be reconciled with *Dale*." 809 A.2d at 1200.

- In August, 2002, the city council of Ann Arbor, Michigan, withdrew the city from United Way participation, because of the Scouts' leader-selection policies. Subsequently, Washtenaw United Way officials voted to stop directing any United Way funds to the Boy Scouts, and the city responded by rejoining the United Way's fund raising campaign. *See* Maryanne George, *Ann Arbor, United Way Reunite; Group Alters Scout Tie Over Its Ban on Gays*, Detroit Free Press, Mar. 6, 2002 (2002 WL 16412362).

- In October, 2002, the board of supervisors of Multnomah County, Oregon, passed a measure threatening to halt the United Way's annual giving campaign among county employees if the United Way did not withhold money from the Boy Scouts because of Scout leadership criteria. *See* Scott Learn, *County Gives United Way a Deadline*, Portland Oregonian, Oct. 4, 2002 (2002 WL 3977354). Multnomah County Code § 9.630. The government pressure had the desired effect: In April of 2003, The United Way of the Columbia-Willamette adopted a new policy that will prohibit the Boy Scouts of America from receiving regular contributions as long as the Scouts continued to conform their membership policies with their beliefs on matters of sexual orientation. *See* David Austin, *United Way Adds Anti-Bias Rule*, Portland Oregonian, Apr. 4, 2003 (2003 WL 3815893).

- In November, 2002, a California court of appeal upheld a punitive berth fee at the Berkeley Marina that the City of Berkeley imposes on the Berkeley Sea Scouts because of their affiliation with the Boy Scouts of America, and because Berkeley officials consider the Boy Scouts a "discriminatory" organization. *See Evans*, 127 Cal. Rptr. 2d at 696. The California Supreme Court has granted review. Pacific Legal Foundation attorneys represent Amicus Tonatiuh Alvarez as one of the petitioners challenging Berkeley's financial punishment of the Sea Scouts as a violation of First Amendment and Equal Protection rights. As in the case at bar,

the court of appeal approved the imposition of the berth fee on the Sea Scouts with the rationale that it results from the application of a supposedly neutral antidiscrimination law. *Evans*, 127 Cal. Rptr. 2d at 703-05.

- In July, 2003, a federal district court in San Diego ruled that the city's lease of park property to the Boy Scouts violates the federal Establishment Clause, because the Scouts' core principles include belief in God. *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003). Many other nonprofits, with different viewpoints, continue to enjoy leases of city property, including park property. Nevertheless, the court rejected the argument that voiding the Scouts' lease amounts to discrimination against Scout viewpoints that enjoy constitutional protection in accordance with *Dale*. *Barnes-Wallace*, 275 F. Supp. 2d at 1288. In dicta, the court cited the case at bar in claiming that the city could itself choose to exclude the Scouts because of their membership policies, if it did so through a "viewpoint neutral" law and with an aim "to protect persons from the effects of discrimination and not to exact a price for the organization's protected expression." *Id.* (citing *Wyman*, 335 F.3d at 93-94).

In sum, even though the Scouts turned back assaults on their freedoms in Broward County and the District of Columbia, various government entities and officials still advance the notion that the Scouts may be punished for exercising the rights acknowledged in *Dale*.

These efforts at end runs around *Dale* carry disquieting reminders of the disrespect that greeted another landmark civil liberties decision, *Brown v. Board of Education*, 347 U.S. 483 (1954). Local public officials in much of the South engaged in "subterfuges that evaded or drastically slowed desegregation." Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 Yale L.J. 999, 1014 (1989) (citation omitted).

This Court denied the authority of inferior tribunals or officeholders to disobey *Brown*. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). So, too, Connecticut's attempt to undermine *Dale* must be rejected. The word must go out that subterfuges must cease and the Scouts' civil rights must be respected.

That the Boy Scouts of America, of all organizations, should be subjected to legal and financial disabilities defies more than this Court's precedents; it also assails common sense. Anti-Scout initiatives by government officials should roil the social conscience of everyone concerned about the welfare of youth. The good work that the Scouts do for boys of all backgrounds was well summarized by the Seventh Circuit:

> Successful self-government requires that citizens willingly participate in public affairs, make sacrifices for the common good, curb their selfishness, and join in taking responsibility for themselves and others. The central question for those concerned about maintaining the health of our republic must be, "how do individuals acquire the virtues necessary for self-government?" History provides only one answer: through the institutions of civil society, like the family, religious groups, and voluntary associations, which inculcate a sense of moral values in the young. Throughout its . . . existence, the Boy Scouts have successfully presented its combination of educational, social, athletic, craft, wilderness training and outdoor activities to our young people. The leadership of many in our government is a testimonial to the success of Boy Scout activities. In recent years, single parent families, gang activity, availability of drugs and other factors have increased the dire need for support structures like the Scouts. When the government . . . seeks to regulate the membership of an organization like the Boy Scouts in a way that scuttles its founding principles, we run

> the risk of undermining one of the seedbeds of virtue that cultivate the sorts of citizens our nation so desperately needs.

Welsh v. Boy Scouts of America, 993 F.2d 1267, 1278 (7th Cir. 1993).

How ironic, how socially destructive, that Connecticut and other misguided governments are working to undermine such a beneficial organization. The ultimate victims of these ideologically inspired crusades are the boys who will be denied opportunities because of lost funding. Government attacks on the Scouts are not just destructive in terms of policy, however. Making the Scouts pay a price for exercising their First Amendment rights is also unconstitutional. The fact that this assault on civil liberties is not limited to Connecticut underscores the case for granting the Boy Scouts' petition.

CONCLUSION

"[G]eneral antidiscrimination statutes [ought not to be] read expansively, beyond their clear application, when the broad reading would directly burden protected First Amendment rights." William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 Yale L.J. 2411, 2462-63 (1997), *quoted in Curran v. Mount Diablo Council of the Boy Scouts of America*, 17 Cal. 4th at 728 (Kennard, J., concurring). This Court's precedents go further, by exempting expressive associations even from facially neutral antidiscrimination laws, where application of such a law would curtail or penalize the exercise of First Amendment rights. The First Amendment trumps any state effort to subject free speech

and association rights to legal disabilities. Because the court below failed to acknowledge this fact, amici respectfully request that this Court grant a writ of certiorari.

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IN THE
SUPREME COURT OF THE UNITED STATES

BOY SCOUTS OF AMERICA AND CONNECTICUT RIVERS COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

v.

NANCY WYMAN, et al.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AGUDATH ISRAEL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITION

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BRIEF OF AGUDATH ISRAEL OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITION

INTEREST OF THE AMICUS CURIAE

Agudath Israel of America is a national Orthodox Jewish organization with constituents, and constituent religious bodies, across the United States. We respectfully submit this *amicus curiae* brief in support of the Petition for one simple purpose: to alert the Court to the stake traditional

religious communities like ours have in the outcome of this case. [1]

For one thing, as petitioner correctly points out (Petition, at 26-28), the decision below may be cited as support for the all too common practice of certain states and state actors to exclude religious organizations, merely by virtue of their religious character, from participating in state employee charitable campaigns or gaining access to other public forums or programs – exclusions that are at tension with this Court's insistence on religious viewpoint neutrality in cases like *Lamb's Chapel* v. *Center Moriches Union Free School District*, 508 U.S. 384 (1993), *Good News Club* v. *Milford School District*, 533 U.S. 98 (2001), and *Rosenberger* v. *Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995).

For many religious organizations, however, the danger posed by the decision below is far more direct. Agudath Israel itself is a good example. The attitude of Orthodox Judaism toward homosexual conduct is fashioned by the biblical description of such conduct as "*to'eivah*," an abomination (*Leviticus* 20:13). Accordingly, to take an example most similar to the case of the Boy Scouts, the youth programs sponsored by Agudath Israel and its constituent congregations, as well as those sponsored by other Orthodox Jewish religious bodies, would regard a homosexual as an inappropriate role

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[1] Pursuant to Supreme Court Rule 37.3(a), we have obtained written consent from all parties to the filing of this brief. Pursuant to Supreme Court Rule 37.6, counsel for the amicus certifies that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the amicus, has made a monetary contribution to the preparation or submission of this brief.

We acknowledge and thank Simon Singer, a law student at Fordham Law School, for his assistance with this brief.

model for children, and would refuse to permit an openly gay person to serve as a youth leader.

In line with this position, Agudath Israel submitted an *amicus curiae* brief in support of the Boy Scouts' certiorari petition in the *Dale* case, urging the Court to accept the case for review, and to rule as it ultimately did: that the Boy Scouts' policy with respect to homosexual scout leaders was a constitutionally protected aspect of expressive association. (*Boy Scouts of America* v. *Dale,* No. 99-699, Brief of Agudath Israel of America as Amicus Curiae in Support of the Petition, Nov. 26, 1999.) We pointed out (at 2-4) that, absent such protection, traditional religious communities like ours would be extremely vulnerable to discrimination claims similar to that asserted by Mr. Dale against the Boy Scouts – because, in the aftermath of *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872 (1990), and *City of Boerne* v. *Flores,* 521 U.S. 507 (1997), the Free Exercise clause offers little if any comfort to any religious body whose faith demands that it engage in conduct deemed to be unlawful discrimination under generally applicable provisions of secular law; and because many state and local anti-discrimination laws carve out no exemptions, or extremely limited exemptions, for religious entities whose tenets may occasionally require such discrimination.[2]

Happily, from our perspective, the Court in *Dale* found that the Boy Scouts' policy regarding homosexual leaders enjoyed constitutional protection. *Boy Scouts of America* v. *Dale,* 530 U.S. 640 (2000). Following the Court's ruling, however, the Boy Scouts encountered a significant backlash

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[2] The *amicus* brief of The Beckett Fund for Religious Liberty, et al. in the instant case catalogues, in fairly comprehensive detail, the varying approaches of the states to the issue of religious exemptions from state antidiscrimination laws. Brief Amicus Curiae of The Beckett Fund for Religious Liberty, et al. in Support of Petitioners, Boy Scouts of America v. Wyman, February 5, 2004, at 4-6.

and were treated, in the words of columnist Nat Hentoff, "like pariahs around the county." Hentoff, "Cut Americas's Boy Scouts a Break", *Washington Times* (June 18, 2001). One manifestation of that backlash was a series of governmental actions, like the one at issue in this case, that sought to penalize the Boy Scouts for their policy by excluding them from certain privileges and benefits generally available to other chartable and non-profit entities.

Nor have the Boy Scouts been the only ones targeted for opprobrium for their stance on homosexuality; so too have traditional religious communities like ours. The *New York Sun*, in an editorial shortly after the Massachusetts Supreme Court's same-sex marriage ruling in *Goodridge v. Department of Public Health*, 440 Mass. 309 (2003), took note of "the fact that, with a few exceptions, this cause is being advanced through the denigration of Jews and Christians who adhere to the fundamentals of religious law." The editorial gave us at Agudah Israel particular cause for anguish:

> "Why, a friend asked us several months ago, has The New York Sun failed to take an editorial stand on the question of gay marriage? Our friend, a decent and exceptionally well-educated person, was perplexed, he said, because he was aware that we welcome gay and lesbian individuals and couples into our workplace, homes, friendships, and families. We responded to his question by asking him what he would do about the Agudath Israel and its Council of Torah Sages. 'I see them as bigots,' replied our friend, 'just like any other religious fundamentalists.'"

Editorial, "'Simply About Prejudice'", *New York Sun* (Nov. 24, 2003).

The *Sun*'s friend echoed a sentiment that is finding increasingly aggressive expression in American society. Consider, for example, the text of an ad that appeared on the September 1, 1998 op-ed page of *The New York Times* and elsewhere:

> LET ME ASK YOU SOMETHING...
> SINCE WHEN IS BIGOTRY A MORAL VIRTUE?
>
> Back in 1906, a leading American theologian published a best-selling book justifying discrimination against African Americans, saying they were creatures of uncontrollable "sensuality." Similar racist theories were spouted by politicians like the notorious "Pitchfork" Ben Tillman who toured the country under the banner, "Negro equality in politics means social equality, mongrelization, hellfire and damnation!" Belief in the innate immorality of black people, buttressed by selected scriptural references, formed the basis for slavery, segregation and lynchings.
>
> Now come the homophobes, spouting the same hate-filled rhetoric about a different minority group. "Homosexuality is immoral, unscriptural and unhealthy," we are told. It is a "sin", like theft and drunkenness, according to Senate Majority Leader Trent Lott. The Pitchfork Tillmans of today warn that the "homosexual lobby" wants to bring about the destruction of the American family. Just like their racist antecedents, they are trying to whip up hatred and intolerance in order to build public support for anti-gay laws.
>
> Sure, they can try to hide behind morality, but we all know a bigot when we see one. Think about it.
>
> Ira Glasser
> Executive Director of the American Civil Liberties Union

In line with its depiction of religious traditionalists who regard homosexuality as sinful or immoral as hate-filled bigots, the ACLU took a lead role in torpedoing the 1999 Religious Liberty Protection Act (a bill designed to restore free exercise

protection in a manner consistent with the Court's decision in *City of Boerne*, *supra*), on the theory that the protections of the bill should not extend to conflicts that may arise between civil rights and religious practice. *See* Jacobson, "A Coalition with a Liberal-Leave Policy," *National Journal* (Oct. 30, 1999); Bernstein, "Liberties vs. Anti-Bias Laws," *Washington Times* (Aug. 15, 1999). For the ACLU and its cohorts, religious freedom is a fine slogan, but it must take a legal and social back seat to the egalitarian dictates of modern day society.

We now renew our plea to the Court to accept this case for review as well, and to reverse the Second Circuit's decision that Connecticut may constitutionally disqualify the Boy Scouts from the state's workplace charitable campaign. If governmental entities are free to impose such penalties on an organization like the Boy Scouts – or other penalties, like the ones at issue in *Barnes-Wallace* v. *Boy Scouts of America,* 275 F. Supp. 2d 1259 (S.D. Cal. 2003) (withdrawal of city campgrounds lease), *Boy Scouts of America* v. *Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001) (barring after-hours use of public school facilities), and *Evans* v. *City of Berkeley,* 127 Cal. Rptr. 2d 696 (Cal. Ct. App. 2002) (exclusion from boat-berthing privileges at City marina); or perhaps even more severe penalties such as withdrawal of tax exempt status, as intimated by Judge Calabresi in the Second Circuit below, 335 F.3d at 92 n.5 – then presumably they are free to impose similar penalties on religious organizations that have similar policies, at least where those policies are not expressly permitted by statutory exemption.

Indeed, while this case, like *Dale,* does not directly involve a religious institution, if the Second Circuit's decision is allowed to stand, its main impact may well be felt in traditional faith communities and organizations like ours. For, as we wrote in our *Dale* brief (at page 6):

> "[I]f current social trends are any indication, there may come a time when groups like the Boy Scouts may alter their perspective on the morality of homosexual conduct. Religious denominations like Orthodox Judaism, though – and the numerous other faith groups across this nation that do not regard *Leviticus* as irrelevant – are likely to remain stubborn holdouts. Our stake in an America that allows orthodox faiths to dissent from secular orthodoxies of the day is substantial and enduring, and leads us to raise our voice in support of the Boy Scouts' petition."

ARGUMENT

The petitioner's brief amply demonstrates that the decision below departs from this Court's established precedent and conflicts with decisions of other lower courts. At this point, mindful of the burden *amicus curiae* briefs impose on the Court, particularly at the petition stage of a proceeding, we simply adopt petitioner's argument as our own.

CONCLUSION

This case makes clear that the remarkable legal gains made by the homosexual community in recent years – whatever one may think of those gains – are by no means a "zero sum game"; they exact a heavy toll on those who dare to still adhere to the traditional view on homosexuality. In *Lawrence* v. *Texas,* 123 S. Ct. 2472, 2480 (2003), the Court described that traditional view:

> "[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of rights and acceptable behavior, and respect for the traditional family. For many persons

these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives."

The question this case raises is whether organizations and communities that adhere to those convictions may be treated as legal pariahs, Pitchfork Tillman bigots to be demonized and ostracized from the rest of civilized society through the type of penalty imposed by Connecticut on the Boy Scouts. For the reasons set forth in the Boy Scouts' petition, and as elaborated herein, *amicus curiae* Agudath Israel of America respectfully urges the Court to grant the petition, accept certiorari, and reverse the decision below.

Respectfully submitted,

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No. 03-956

IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA, ET AL.,

Petitioners,

v.

NANCY WYMAN,
COMPTROLLER OF THE STATE OF CONNECTICUT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF CITIZENS FOR THE PRESERVATION OF CONSTITUTIONAL RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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This amicus curiae brief is submitted in support of the First Amendment claim of the Boy Scouts.

INTEREST OF AMICUS CURIAE[1]

Citizens for the Preservation of Constitutional Rights ("CPCR") is a nonprofit corporation. Through its litigation activities, CPCR seeks to protect the constitutional rights of individual citizens against unlawful encroachment by the state. The Boy Scouts' First Amendment rights to freedom of speech and association are individual rights which fall squarely within the parameters of concern which form the basis for CPCR's existence and mission. "[R]ights created by the first section of the First Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."

Founding members of CPCR have litigated constitutional issues at every level of the state and federal system, including the United States Supreme Court. As counsel for petitioners in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston.*, 515 U.S. 557 (1995), CPCR has a special interest in preserving this Court's unanimous holding in that case.

STATEMENT OF THE CASE

Amicus adopts the statement of facts, constitutional provisions and statutes as set forth in the appeal brief for the Boy Scouts.

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[1] Counsel for the parties have consented to the filing of this *amicus* brief. Their joint notice of consent is on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part. Sean Brady contributed the printing costs associated with the preparation and submission of this brief for the Citizens for the Preservation of Constitutional Rights.

SUMMARY OF ARGUMENT

The Second Circuit's decision dismantles this Court's unanimous holding in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), by compelling the Boy Scouts to convey a message with which they disagree. In *Hurley* the Court unanimously held that requiring an organization of private citizens to include among its members a person or group imparting a message the organizers do not wish to convey violates the First Amendment. Likewise, the Boy Scouts merely seek to prevent their members from conveying a message they do not wish to convey. The Boy Scouts, like the parade organizers in *Hurley*, may exclude those members imparting a message the Scouts do not wish to convey because the First Amendment fully protects a speaker's autonomy to choose the content of his own message. Therefore, the State of Connecticut, in compelling the inclusion of an unwanted and antithetical message, violates the Boy Scouts' First Amendment guarantee of freedom of speech.

The Boy Scouts are in a nearly identical situation to the parade organizers in *Hurley*. Like the parade organizers, the South Boston Allied War Veterans Council ("Council"), the Scouts wish only to control the message that their own members convey. As a result, the Boy Scouts only exclude a member based on sexual orientation if that member *speaks* with a message that contradicts the message that the Boy Scouts wish to convey. The Scouts, like the Council, do not exclude any member merely on the basis of sexual orientation.

This distinction between (i) excluding members because of their particular messages, and (ii) excluding members merely on the basis of sexual orientation was instrumental in *Hurley*. There, the Court recognized that the Council did not seek to exclude homosexuals as such from participating in the parade. Rather, the Council only sought to prevent marchers from imparting a message the organizers did not

wish to convey. Similarly, the Boy Scouts do not discriminate against or exclude any scout merely on the basis of his or her sexual orientation. The Boy Scouts seek only to prevent a member from imparting an unwanted and antithetical message.

Thus, here, as in *Hurley*, the State is attempting to mandate that a private organization include speech with which it disagrees.[2] However, as this Court concluded in *Hurley*: "this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." 515 U.S. at 573. The Second Circuit's decision, which allows Connecticut to exclude the Scouts for speech covered by this "fundamental rule of protection," is thus not only an affront to the First Amendment, but a direct challenge to this Court's unanimous holding in *Hurley*. The decision, if not reversed, will have profound effects upon the exercise of First Amendment rights, not only within Connecticut, but within other state and federal jurisdictions.

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[2] The result in *Hurley* would have been exactly the same whether (i) the State mandated that the Council include the Irish-American Gay, Lesbian and Bisexual Group ("GLIB") and its message in the Council's parade, or (ii) the State denied the Council a parade permit unless it included GLIB and its message. Both constitute compelled speech. *See infra* I.3. Similarly, the State's action would also have constituted compelled speech if the State had attempted to charge the Council different prices for a parade permit depending on whether or not the Council included GLIB and its message.

ARGUMENT

I. The Decision Below Conflicts With This Court's Unanimous Decision in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* and Other Cases Protecting the First Amendment Right of the Boy Scouts to Exclude Speech With Which the Scouts Disagree.

The Second Circuit's decision directly contradicts *Hurley*. The court below failed to grasp that, like the Council in *Hurley*, the Boys Scouts do not exclude anyone merely on the basis of sexual orientation. Rather, the Boy Scouts only exclude a member for conveying a message the Scouts do not wish to convey. Yet the Supreme Court emphasized in *Hurley* that a speaker's autonomy includes the right to exclude members who convey an unwanted and antithetical message. This Court explicitly stated that the First Amendment fully protects a speaker's "autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573. As a result, the Court unanimously held that requiring "private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey" violates the First Amendment. *Id.* at 559. Thus, requiring the Boys Scouts to include members who convey a message the organizers do not wish to express clearly violates the First Amendment and directly contradicts *Hurley*.

A. The Boy Scouts Merely Seek To Prevent Their Members From Conveying A Message The Scouts Do Not Wish To Convey.

The Second Circuit confused the Boy Scouts' message with the sexual orientation of the group's members. The Boy Scouts seek only to prevent a member from conveying a message the group does not wish to convey. The Boy Scouts

do not exclude any scout merely on the basis of sexual orientation. Indeed, the Court of Appeals did not dispute the fact that the Boy Scouts do not discriminate on the basis of sexual orientation as such. *See Boy Scouts of America v. Wyman*, 335 F.3d 80, 85 (2d Cir. 2003) (quoting a letter from the Boy Scouts which stated their policy as not registering "*avowed* homosexuals" as adult volunteer leaders or youth members but that "other jobs within scouting are open to known or avowed homosexuals") (emphasis added). It is only when a member verbalizes a message that the Boy Scouts do not wish to convey that the Boy Scouts take any action at all. *See* A 1075 ("Boy Scouting makes no effort to discover the sexual orientation of any person. Scouting's message is, however, compromised when [messages] inconsistent with BSA standards" are conveyed.). Thus, the Boy Scouts only exclude a member on the basis of a conveyed message that is antithetical to the Boy Scout Oath and the Boy Scout Law—two of the fundamental ways in which the Scouts express their fundamental values and ideas. *See Boy Scouts of America v. Dale*, 530 U.S. 640, 649 (2000) (quoting the Boy Scouts mission statement, which states: "The values we strive to instill are based on those found in the Scout Oath and Law"); *see also id.* at 641 ("The Boy Scouts asserts that homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law, particularly those represented by the terms "morally straight" and "clean," and that the organization does not want to promote homosexual conduct as a legitimate form of behavior. The Court gives deference to the Boy Scouts' assertions regarding the nature of its expression.") (citing *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 123-24 (1981)).

In *Hurley* the Supreme Court acknowledged this same distinction between (i) excluding members because of their particular messages, and (ii) excluding members merely on the basis of sexual orientation. The Court noted that the Council did not seek to exclude homosexuals from

participation in the parade. *See Hurley*, 515 U.S. at 572 ("Petitioners disclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march."). The Council only sought to prevent marchers from carrying a banner whose message the Council did not wish to convey. *See id.* at 573 ("[T]he disagreement goes to the admission of GLIB as its own parade unit carrying its own banner."); *see also New York County Bd. of Ancient Order of Hibernians v. Dinkins*, 814 F. Supp. 358, 362 (S.D.N.Y. 1993) (concluding that, because the Ancient Order of Hibernians ("AOH") allows "marchers whose sexual orientation is different from that approved of by the AOH to march in the Parade without a banner as guests of the various Parade contingents[,] . . . the true reason the AOH and the Parade Committee seek to exclude ILGO [the Irish Lesbian and Gay Organization] is because ILGO would insist on marching under a separate banner that would, in effect, identify the AOH as condoning sexual practices contrary to the message that the AOH believes the Parade should convey.").

In fact, the Supreme Court in *Hurley* agreed that it was clearly erroneous to equate exclusion on the basis of a group's message with exclusion on the basis of its members' sexual orientation. Justice Souter approvingly quoted the dissenting opinion of Massachusetts Justice Nolan. *See Hurley*, 515 U.S. at 565-66. Like the unanimous Supreme Court, Justice Nolan had also concluded that the Council's message was protected under the First Amendment because exclusion on the basis of a message was fundamentally different from exclusion based on sexual orientation. *See id.* at 565 ("[Justice Nolan] found clear error in the trial judge's equation of exclusion on the basis of GLIB's message with exclusion on the basis of its members' sexual orientation. To the dissent this appeared false in the light of 'overwhelming evidence' that the Council objected to GLIB on account of its message and a dearth of testimony or documentation

indicating that sexual orientation was the bar to admission.") (quoting *Irish-American Gay, Lesbian & Bisexual Group of Boston v. City of Boston*, 636 N.E.2d 1293, 1304 (Mass. 1994)). The Supreme Court has therefore emphasized this distinction between exclusion on the basis of a message and exclusion on the basis of sexual orientation.

Furthermore, the trial court in *Hurley* acknowledged, and this Court affirmed, that homosexuals' self-identification is a viewpoint that private associations have a constitutional right to exclude. 515 U.S. at 574 (holding that "the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals"). Justice Souter reiterated that the trial court had "found the Council's 'final position [to be] that GLIB would be excluded *because of its values and its message, i.e., its members' sexual orientation.*'" *Id.* at 562 (emphasis added) (quoting *Irish-American Gay, Lesbian & Bisexual Group of Boston v. City of Boston*, No. 92-1518, 1993 Mass. Super. LEXIS 320, 324 n.5 (Mass. Super. Ct. Dec. 15, 1993)) (citing Tr. of Closing Arg. 43, 51-52 (Nov. 23, 1993)).

Thus, the Supreme Court has recognized that self-identification of one's sexual orientation through speech necessarily conveys a distinct message and a particular viewpoint. Excluding a person because of a message that is conveyed through speech (i.e., through self-identification of one's sexual orientation) should therefore be understood as completely distinct from excluding a person merely on the basis of his or her sexual orientation. The Boy Scouts, however, only exclude a member if he or she speaks a message with which the Scouts disagree.[3]

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[3] Under Connecticut's supposed rationale for excluding the Boy Scouts, it is inexplicable how the State was able to distinguish between the Boy Scouts and the Connecticut Stonewall Foundation, another organization in the State Employee Charitable Campaign, if the State was actually applying *Hurley* consistently. In a deposition at the trial level, testimony from Leslie Brett (former Chair of the Connecticut Commission on Human Rights & Opportunities

B. The Boy Scouts, Like the Council in *Hurley*, May Exclude Those Members Imparting a Message the Scouts Do Not Wish to Convey Because the First Amendment Fully Protects a Speaker's Autonomy To Choose the Content of His Own Message.

The Boy Scouts may exclude those members imparting a message the Scouts do not wish to express. As this Court emphasized in *Hurley*, the First Amendment fully protects a speaker's "autonomy to choose the content of his own message." 515 U.S. at 573. In *Hurley* the Council exercised this autonomy to choose the content of its message by excluding participants who conveyed an antithetical message. But as demonstrated in I.A. above, the Boy Scouts take the exact same action as the Council in *Hurley*. Both organizations only exclude a member or participant who conveys an antithetical message. Therefore, in restricting the Scouts' "autonomy to choose the content of [their] own message," Connecticut violates the First Amendment. The Second Circuit's decision thus dismantles this Court's unanimous holding in *Hurley* that the state cannot compel an organization of private citizens to include members who express a viewpoint or message with which the speaker disagrees. 515 U.S. at 559.

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and a member of the Stonewall Foundation) indicated that the Stonewall Foundation was *not* excluded from the Charitable Campaign, even though people opposed to homosexuality are not allowed to present Stonewall's message, on the basis that Stonewall has both heterosexual and homosexual members. *See* A 352-53 (stating that the Stonewall Foundation has "not knowingly" ever [accepted] a member who was opposed to gay or lesbian rights and that if they knew: "We wouldn't include that person in our activities *speaking* or educating the public. . . . We wouldn't let that person *speak* or represent the Stonewall Foundation.") (emphasis added). But this policy is exactly the same as the Boy Scouts' policy. The Boy Scouts have both heterosexual and homosexual members, but advocates of homosexuality are not allowed to present the Boy Scouts' message. The two organizations' policies regarding speech, membership, and advocacy are thus indistinguishable.

As the Court emphasized in *Hurley*, the State cannot abridge free speech rights even in the name of preventing discrimination. The Second Circuit, however, has held that Connecticut's decision to exclude the Boy Scouts from its State Employee Charitable Campaign for alleged violations of Connecticut's Gay Rights Law does not violate the Scouts' First Amendment rights. *Wyman*, 335 F.3d at 99; Conn. Gen. Stat. § 5-262(a)(3) (1998); *id.* at § 46a-81. In so holding, the Second Circuit ignored the distinction in *Hurley* between exclusion from participation based on sexual orientation and exclusion of a particular message. *Hurley*, 515 U.S. at 559. As stated in I.A above, the court in *Wyman* did not even dispute the fact that the Boy Scouts do not discriminate on the basis of sexual orientation as such. *See Wyman*, 335 F.3d at 85; *see also Dale*, 530 U.S. at 651-53. However, the Second Circuit ignored the fact that the Boy Scouts only prohibit a person from participating if that person expresses a viewpoint contrary to the Boy Scout Oath and Boy Scout Law. As counsel for the Boy Scouts said in oral argument in *Dale*, the scoutmaster "put a banner around his neck" by expressing ideas that the Boy Scouts do not wish to convey. 530 U.S. at 696. The Second Circuit in *Wyman* therefore commits the error that concerned this Court in *Hurley*—namely, abridging the speech rights of private citizens in the name of preventing discrimination. This the First Amendment does not allow.

The Boy Scouts, like the Council in *Hurley*, may exclude those members imparting an antithetical message because the First Amendment fundamentally protects a speaker's "autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573. The Court in *Hurley* explicitly rejected the lower court's supposed justifications for altering the content of a private organization's message. *Id.* (chastising an "approach" in which "any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all

those protected by the law who wished to join in with some expressive demonstration of their own"). The Supreme Court declared that "this use of the State's power violates the fundamental rule of protection under the First Amendment, *that a speaker has the autonomy to choose the content of his own message.*" *Id.* (emphasis added); *see also Riley v. National Federation of the Blind*, 487 U.S. 781, 790-91 (1988) ("The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how they want to say it."); *Meyer v. Grant*, 486 U.S. 414, 424 (1988) ("The First Amendment protects the [petitioners'] right not only to advocate their cause, but also to select what they believe to be the most effective means for so doing.").

The Boy Scouts, therefore, like the Council in *Hurley*, have the same First Amendment autonomy in choosing their own message. *See Hurley*, 515 U.S. at 574. The Boy Scouts and the Council are like authors or composers. Under the First Amendment, they all have the autonomy to choose the message that their group, their parade, their book, or their symphony conveys. *See id.* ("Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day."). The State may not add one sentence to an author's book, may not insert one note to a composer's symphony, and likewise may not compel the Boy Scouts to include a member who conveys an unwanted and antithetical message. *See id.* ("[T]he Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.").

Indeed, this Court's unanimous decision in *Hurley* made clear that, because a speaker has the autonomy to choose his own point of view, a speaker may exclude those with

contrary messages *for whatever reason*. *See Hurley*, 515 U.S. at 574-75. The Court stated:

> The parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade. *But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.*

Id. (emphasis added).

As a result, a private organization's exclusion of certain members on the basis of the message that those members are conveying is protected by the First Amendment. This protection of *speech* is fundamental and was determinative in *Hurley*. A private organization's exclusion of certain members with whom the organization does not wish to *associate* may or may not receive constitutional protection depending on the case. *Compare Boy Scouts of America v. Dale*, 530 U.S 640, 655 (2000) (holding that a state may not prohibit the Boy Scouts from adhering to their viewpoint as expressed in their internal leadership policy) *with Roberts v. United States Jaycees*, 468 U.S. 609, 627 (1984) (holding that compelling the Jaycees to admit women did not violate freedom of association if admission of women did not "impede the organization's ability . . . to disseminate its preferred views"). In contrast, this Court has unanimously held that a private organization's exclusion of certain members on the basis of the *speech* that those members are conveying definitely receives First Amendment protection. *See Hurley*, 515 U.S. at 559 ("The issue in this case is whether Massachusetts may require private citizens who organize a parade to include among its marchers a group

imparting a message the organizers do not wish to convey. We hold that such a mandate violates the First Amendment.").[4]

C. Because the Boy Scouts Have the Autonomy To Choose the Content of Their Own Message, the State, in Compelling the Inclusion of an Unwanted and Antithetical Message, Violates the Boy Scouts' First Amendment Guarantee of Freedom of Speech.

Connecticut violates the Boy Scouts' freedom of speech because the State compels the Scouts to include an unwanted and antithetical message. *Hurley* and a long series of compelled speech cases indicate that the autonomy to convey a message necessarily includes freedom from compelled speech. In *Hurley*, the Court held that forcing the Boy Scouts to include GLIB compelled the Boy Scouts to alter their message. Yet the result in *Hurley* would have been exactly the same if the State had denied the Council a parade permit because of the Council's refusal to include GLIB. Both instances constitute compelled speech. Similarly, here, the State of Connecticut's action constitutes compelled speech of the Boy Scouts whether (i) the State allows the Boy Scouts to participate in the State Employee Charitable Campaign but mandates the inclusion of individuals with an antithetical message, *or* (ii) the State denies the Boy Scouts access to the State Employee Charitable Campaign for refusing to include individuals with an antithetical message.

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[4] Of course, the distinction between the Court's treatment of free association and free speech does not preclude the possibility that a State is simultaneously violating both. For instance, this *amicus* argues that Connecticut violates the Boy Scouts' freedom of speech, but believes that Connecticut's actions actually violate both of these fundamental constitutional rights. *Cf. New York County Bd. of Ancient Order of Hibernians v. Dinkins*, 814 F. Supp. 358, 368 (S.D.N.Y. 1993) (finding it unnecessary to rule on the issue of freedom of association but acknowledging "there may well be substance to this argument" after deciding the case on the basis of freedom of speech).

Either way the State's action constitutes compelled speech under *Hurley*.[5] *See Hurley*, 515 U.S. at 563 (rejecting as unconstitutional the lower court's supposed justification that "because the state did not mandate inclusion of GLIB but only prohibited discrimination based on sexual orientation" the "infringement" on the First Amendment was only "incidental"); *see also infra* I.4.

Writing for the Court in *Hurley*, Justice Souter emphasized that forcing a particular view onto a speaker clearly violates the speaker's autonomy to convey his own message. *See Hurley*, 515 U.S. at 576 ("[W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised."); *see also Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 16 (1986) (plurality opinion) ("[If] the government [were] freely able to compel . . . speakers to propound political messages with which they disagree, . . . protection [of a speaker's freedom] would be empty, for the government could require speakers to affirm in one breath that which they deny in the next.").

Justice Souter emphasized the importance of the speaker's First Amendment right not to convey a message that he does not want to express. *See Hurley*, 515 U.S. at 573 ("'Since *all* speech inherently involves choices of what to say and what to leave unsaid,' . . . one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'") (quoting *Pacific Gas & Electric Co.*, 475 U.S. at 11, 16); *id.* ("[The State] may not

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[5] Imagine, for example, if the State mandated that a person must say "I love Democrats" or "I love Republicans" in order to vote or if a person had to salute the flag in order to have access to a public park. Such mandates constitute compelled speech whether or not the person decides to vote or use the park. Or suppose that the State implemented an eighty percent tax on everyone but would reduce the tax to twenty percent for any citizen willing to state a certain message. The State could not argue that, because citizens remain "free" not to make the statement, this scheme would not constitute compelled speech.

compel affirmance of a belief with which the speaker disagrees . . . .") (citing *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943)).

Moreover, the very purpose of the First Amendment is to foreclose public authorities from assuming a guardianship of the public mind. *Thomas v. Collins*, 323 U.S. 516, 545 (1945); *see also Wallace v. Jaffree*, 472 U.S. 38, 48-55 (1985) (First Amendment adopted to curtail power of Congress to interfere with individual's freedom to "express himself in accordance with the dictates of his own conscience"); *Barnette*, 319 U.S. at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."); *New York County Bd. of Ancient Order of Hibernians v. Dinkins*, 814 F. Supp. 358, 369 (S.D.N.Y. 1993) ("Such activity (telling citizens what they must think and how they must express themselves) is something one would expect from the 'Thought Police' described by George Orwell. The humor of naming the thought police the 'Human Rights Commission' is particularly Orwellian.").

Just as selective exclusion from a public forum by the State may not be based on content, *Chicago Police Dept. v. Mosley*, 408 U.S. 92 (1972), neither may a citizen be compelled to express the ideological views of the state. *See Wooley v. Maynard*, 430 U.S. 705, 717 (1977) ("[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."); *see also Redgrave v. B.S.O.*, 855 F.2d 888, 906 (1st Cir. 1988), *cert. denied*, 488 U.S. 1043 (1988) ("We have been unable to find any case, involving the arts or otherwise, in which a state has been allowed to compel expression.").

Indeed, this Court has repeatedly emphasized that the State is just as constrained in mandating speech as it is in

prohibiting speech. *See Riley*, 487 U.S. at 796-97 ("[I]n the context of protected speech, the difference [between compelled speech and compelled silence] is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."); *Wooley*, 430 U.S. at 714 ("We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.") (quoting *Barnette*, 319 U.S. at 637); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (Requiring newspapers to give equal reply space to those they editorially criticize "operates as a command in the same sense as a statute or regulation forbidding appellant to publish a specified matter.").

Thus, *Hurley* and the Court's other compelled speech precedents indicate that a speaker's autonomy to convey a message necessarily includes freedom from compelled speech. In compelling the inclusion of an unwanted and antithetical message, the State of Connecticut is thus violating the Boy Scouts' First Amendment guarantee of freedom of speech. The United States Supreme Court has already held that "[c]ompelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set. . . . The Commission's order also impermissibly requires an appellant to associate with speech with which appellant may disagree." *Pacific Gas & Electric Co.*, 475 U.S. at 9, 15. However, "impermissibly requir[ing] an appellant to associate with speech with which appellant may disagree" is exactly what Connecticut is attempting to do by requiring the Boy Scouts to include speakers with which they disagree.

D. The Second Circuit's Rationale That the Boy Scouts Must "Pay-a-Price" For Speech Has Already Been Rejected Explicitly In *Hurley*.

The Second Circuit's supposed rationale that the Boy Scouts must "pay-a-price" for exercising their First Amendment rights has already been rejected in *Hurley*. The Second Circuit admits that its interpretation "may be cold comfort to those whose expression the law, in practice, limits." *Wyman*, 335 F.3d at 95 n.8. However, the Second Circuit then asserts that the speech restriction is justified because "Connecticut has not prevented the BSA from exercising its First Amendment rights; it has instead set up a regulatory scheme . . . under which, as it happens, the BSA *pays a price* for doing so." *Id.* (emphasis added).

Yet the Supreme Court unanimously rejected this "pay-a-price" for speech rationale when the lower court in *Hurley* also offered it as a supposed justification for restricting First Amendment rights. The Court stated in *Hurley*: "[t]he court [below] held that because the statute did not mandate inclusion of GLIB but only prohibited discrimination based on sexual orientation, any infringement on the Council's right to expressive association was only 'incidental' and 'no greater than necessary to accomplish the statute's legitimate purpose' of eradicating discrimination." *Hurley*, 515 U.S. at 563 (citation omitted). However, the Supreme Court unanimously reversed this decision. The reversal illustrates this Court's emphatic rejection of the constitutionality of this "pay-a-price" rationale for restricting First Amendment rights.

The "pay-a-price" for speech rationale must fail even though some incidental restrictions on speech have been upheld where the purpose of the restriction is unrelated to the content of the expression. *See Ward v. Rock Against Racism*, 491 U.S. 781, 781 (1980). These incidental restrictions on protected speech, however, are only justified if they are content-neutral. The government may not consider either the

content or subject matter of the speech. *See Consolidated Edison Co. of N.Y. v. Public Service Comm'n*, 447 U.S. 530, 536 (1980); *see also Hudgens v. N.L.R.B.*, 424 U.S. 507, 520 (1976) ("Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). Here, however, the State has attempted impermissibly to change the communicative message of the Boy Scouts by requiring them to include scouts who convey a message that is antithetical to the Scout Oath and Scout Law. Because these conditions can hardly be confused with time, place, or manner restrictions, they violate the First Amendment.

Furthermore, proscribing the Boy Scouts from excluding certain messages would lead people to believe that the Boy Scouts actually endorse those ideas. There is no customary practice in which the Boy Scouts disavow the views of individual scouts. It would be just as impracticable for the Boy Scouts to disavow every viewpoint expressed by individual scouts as the Court recognized it would be for the Council in *Hurley* to disavow every viewpoint of parade participants. *See Hurley*, 515 U.S. at 576-77 ("Although each parade unit generally identified itself, each is understood to contribute something to a common theme, and accordingly there is no customary practice whereby private sponsors disavow 'any identity of viewpoint' between themselves and the selected participants. Practice follows practicability here, for such disclaimers would be quite curious in a moving parade."). *But cf. Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 655 (1994) ("[T]here appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator."); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980) (The owner of a shopping mall "can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand."). Each Scout who wears the Boy Scout uniform and speaks affects the

overall message of the Boy Scouts. *Cf. Hurley*, 515 U.S. at 572-73 ("Since every participating unit affects the message conveyed by the private organizers, the state courts' applications of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade."); *id.* at 577 ("Without deciding on the precise significance of the likelihood of misattribution, it nonetheless becomes clear that . . . [the] overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole."). Thus, prohibiting the Boy Scouts from excluding certain messages would lead people to believe erroneously that the Boy Scouts actually endorse those ideas.

Finally, like the Council in *Hurley*, the Boy Scouts do not forfeit the protection of the First Amendment even if the Scouts' message regarding sexual orientation is not the exclusive subject matter of their speech. *See Hurley*, 515 U.S. 569-70 ("[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech."). Indeed, the First Amendment protection of a speaker's autonomy to choose the content of his own message does not even depend on the relative clarity of the message. See *id.* at 569 ("[A] narrow succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' . . . would never reach the unquestionably shielded painting of Jackson Pollock, the music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll.") (citation omitted).

Thus, as *Hurley* demonstrates, the Second Circuit's "pay-a-price" for speech rationale is unconstitutional; it is impracticable for the Boy Scouts to disavow the viewpoints of its individual members; and the First Amendment protects the Boy Scouts' choice of message even if that message is not the exclusive subject matter of their speech. The Boy Scouts' freedom of speech, like the Council's freedom of

speech in *Hurley*, cannot be limited by any of these supposed justifications. Overall, the Boy Scouts' fundamental autonomy to choose the content of their own message, including the right to exclude members who convey an antithetical message, is protected by the First Amendment and this Court's unanimous decision in *Hurley*.

The decision in *Wyman*, if not reversed, will have profound effects upon the exercise of First Amendment rights, not only within Connecticut, but within other state and federal jurisdictions. There are 150 charitable campaigns run by states, public universities, and local governments. More than 140,000 charities participate. Furthermore, if the Second Circuit's decision is allowed to stand, any State could mandate that a citizen or group must convey a certain message in order to receive any public benefit including not only parade permits and access to charitable campaigns but also access to public parks, access to civic facilities, access to welfare, Medicare, Medicaid, and Social Security benefits, and possibly even access to voting.

The words of Massachusetts Justice Nolan are just as applicable to the Second Circuit's decision in *Wyman* as they were when he wrote them about the lower court's decision in *Hurley* before its unanimous reversal:

> Today will be regarded as a sad and frustrating day in the history of the First Amendment to the United States Constitution. Today, a majority of this court upholds, and thereby endorses, a trial judge's flagrant violation of the free speech rights of citizens of this Commonwealth. The majority acquiesces in a judge's order instructing a private group that if it wishes to express itself at all, it must include in its expression a particular idea, one with which the group does not agree. One must strain to recall or even to

> imagine such an obvious violation of the revered rights to free speech.

Irish-American Gay, Lesbian & Bisexual Group of Boston, 636 N.E.2d at 1301 (Nolan, J., dissenting).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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In The
Supreme Court of the United States

BOY SCOUTS OF AMERICA, *et al.*,

Petitioners,

v.

NANCY WYMAN, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA AND THE STATES OF ALABAMA, IDAHO, SOUTH DAKOTA AND UTAH AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

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QUESTION PRESENTED

Whether a State's removal of the Boy Scouts from a forum because of that organization's viewpoints and/or membership policies violates the Boy Scouts' First Amendment rights?

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INTEREST OF AMICI

The Commonwealth of Virginia and the States of Alabama, Idaho, South Dakota and Utah (collectively the "States") are sovereign States of the Union. As such, the States have two distinct interests in this litigation.

First, the States have an interest in ensuring that the important though divisive issues of our time are resolved through a fair competition of ideas on a level playing field. Neither side of any issue should use the power of government to tilt the playing field toward a particular point of view by unconstitutionally discriminating against the opposing view. The history of our Nation illustrates that even an overwhelming political consensus can be reversed in a short time.[1] The viewpoint that commands a political majority today may well be the minority view tomorrow. We do not know what consensus will emerge from this competition of ideas or whether the consensus that does emerge might be reversed in our lifetimes, but we do know that the competition must by governed by the guarantees of the First Amendment. The most fundamental principles of our society demand it. Although one viewpoint may hold sway in a particular jurisdiction, the power of government must not be used to tilt the playing field against those who think differently in order to gain an advantage in the competition of ideas.

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[1] For example, in the second decade of the twentieth century, there was an overwhelming societal consensus that the manufacture, sale, and transportation of intoxicating liquor should be banned. *See* U.S. Const. amend XVIII (ratified January 29, 1919). However, less than fifteen years later, there was an overwhelming societal consensus that this ban should be lifted and the matter left to the individual States. *See* U.S. Const. amend. XXI (ratified December 5, 1933).

This competition of ideas is exemplified by the current debate over homosexuality. It is a sensitive issue, as well as a divisive one. While the debate surely encompasses many shades of opinion, it can perhaps be summarized by two opposing viewpoints. On the one hand, there are those who hold a more traditional view, who regard homosexuality as morally and socially inappropriate. The Boy Scouts are among those holding such a viewpoint and their views guide their selection of the adults who serve as role models in their organization. On the other hand, there are those who hold a non-traditional view, who regard homosexuality as no less legitimate than heterosexuality, and who regard such role model concerns as both unnecessary and offensive. Neither viewpoint is enshrined in the Constitution and neither is beyond its protection. Even so, given the divisiveness over the issue, it is not surprising that the adherents of one view will sometimes attempt to use the power of government to suppress the other view. In some cases, adherents of the traditional view have sought to use government in this manner. In other cases, those who hold the non-traditional view have embarked on such a course. In this case, Connecticut has decided that the Boy Scouts of America must be excluded from a forum simply because the organization embraces and teaches the traditional view. Though Connecticut has not eliminated the Boy Scouts from the competition of ideas, it has tilted the playing field against them.

Connecticut's actions demand that this Court assume the role of umpire and ensure that the competition of ideas takes place on a level playing field. This Court has been called to this role before. When a statewide majority favoring the traditional view of homosexuality attempted to overturn decisions of local governments that favored the

non-traditional view, this Court declared the attempt unconstitutional. *See Romer v. Evans*, 517 U.S. 620 (1996) (invalidating state constitutional amendment prohibiting local governments with otherwise broad legislative power from enacting legislation prohibiting discrimination based on sexual orientation). Similarly, when college and university administrations that favored the traditional view refused to recognize or fund student organizations that favored the non-traditional view, the lower courts, following this Court's decisions, invalidated their actions. *See, e.g., Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997); *Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 561 (8th Cir. 1988); *Gay Lib v. University of Mo.*, 558 F.2d 848 (8th Cir. 1977).

On the other hand, when advocates of the non-traditional view wished to use the private parade of another to advertise their message, this Court vindicated the parade group's right to espouse their own message without dilution. *See Hurley v. Irish-American Gay, Lesbian, and Bisexual Group*, 515 U.S. 557 (1995). Similarly and most importantly for the present case, when New Jersey attempted to require the Boy Scouts to abandon its traditional view and adopt policies reflecting the non-traditional view, this Court recognized the right of the Boy Scouts to follow the traditional view without governmental interference and to select their adult leaders in keeping with their view. *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). Once again, it is time for this Court to protect the level playing field.

Second, the States have an interest in the success of organizations, such as the Boy Scouts, which "instill values in young people" and "prepare them to make ethical choices over their lifetime in achieving their full potential." *Dale*,

530 U.S. at 649 (quoting the Boy Scouts' mission statement). Regardless of how one feels about the Boy Scouts' view of homosexuality, our community benefits from an organization that teaches youth to commit themselves to the ideals of Scouting, as exemplified in the Boy Scouts' Oath and Law.[2] Indeed, the value of the Boy Scouts is demonstrated by the fact that some of our most distinguished citizens and leaders have been shaped by the Boy Scouts. The list of men involved with the Boy Scouts includes three U.S. Presidents, the first man to walk on the moon, the physician who performed the first artificial heart transplant, the all time home run leader, the founder of Microsoft, one of the most successful motion picture

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[2] Recited by millions of American boys over the years, the Boy Scouts' Oath provides:

> On my honor I will do my best
> To do my duty to God and my country
> and to obey the Scout Law;
> To help other people at all times;
> To keep myself physically strong,
> mentally awake, and morally straight.

Dale, 530 U.S. at 649. The Boy Scouts Law, in turn, embodies qualities to which all should aspire, stating: "A Scout is:

- Trustworthy,
- Loyal,
- Helpful,
- Friendly,
- Courteous,
- Kind,
- Obedient,
- Cheerful,
- Thrifty,
- Brave,
- Clean, and
- Reverent."

Id.

directors of all time, as well as numerous Governors, Cabinet Secretaries, and members of Congress. *See Ultimate Boy Scouts of America History Site*, www.members.aol.com/randywoo/bsahis/famous.htm (last viewed on January 6, 2004).

Nevertheless, there are those who believe that the Boy Scouts' embrace of the traditional view of homosexuality outweighs the undisputed positive influence of the organization. In some jurisdictions where such persons constitute the current political majority, the Boy Scouts are being excluded because of their viewpoint. *See, e.g., Boy Scouts of America v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001) (rejecting a local school board's attempt to exclude Boy Scouts from school facilities); *Evans v. City of Berkeley*, 127 Cal. Rptr. 2d 696 (Cal. App. 2002) (upholding the power of the City to exclude Boy Scouts from program allowing non-profit groups to use City's marina rent free), *appeal docketed*, No. S11261 (Cal. March 26, 2003). *See also Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003) (private party lawsuit holding that City violated the federal Establishment Clause by leasing a camp ground to the Boy Scouts).

If government can exclude the Boy Scouts simply because a current political majority disagrees with their view on a single issue, then the future success of the organization will be inhibited. It does not matter that Boy Scouts may suffer viewpoint discrimination only in Connecticut or only in a few jurisdictions. Any exclusion will undermine both the organization and principles of the First Amendment. Government should not be allowed to constrain the Boy Scouts by excluding it from programs generally open to other not-for-profit groups. At some point, this Court surely will have to intervene to ensure that

the First Amendment is upheld and that the numerous positive contributions of the Boy Scouts are not compromised simply because some governments disapprove of their traditional viewpoint. Rather than waiting for some future case, this Court should grant review in this one.

REASONS FOR GRANTING THE WRIT

I. REVIEW IS NECESSARY TO RESOLVE A CONFLICT IN THE CIRCUITS ON THE ISSUE OF WHETHER GOVERNMENT MAY EXCLUDE A PRIVATE ORGANIZATION SIMPLY BECAUSE OF THE ORGANIZATION'S VIEWPOINT.

Review of the decision below is necessary to resolve a split in the Circuits on the issue of whether government can exclude a private organization from participation in a forum simply because the government disagrees with the membership policies or viewpoints of the private organization.

The Second Circuit held that a private organization could be excluded simply because of its viewpoint. To reach that result, the Second Circuit recognized a distinction between direct and indirect regulation of First Amendment rights, a distinction never recognized by this Court, and found it controlling. The Second Circuit reasoned that a law that compels a group to adopt a particular viewpoint is a *direct* regulation of First Amendment rights. In contrast, a law which allows a group to believe whatever it wishes, but denies the group access to a generally available government program – based on its views – is only *indirect* regulation of the freedom of association and expression. According to the Second Circuit, direct regulation is never permitted, but indirect regulation is perfectly

acceptable. In other words, the government cannot tell the Boy Scouts to abandon the traditional view of homosexuality, but it can penalize the Boy Scouts for refusing to abandon policies by which they avoid sending a message they perceive as conflicting with their own.

In sharp contrast, the Eighth Circuit held that a private organization cannot be excluded from an otherwise generally available program simply because of its viewpoint on a particular issue.[3] *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000), *cert. denied*, 532 U.S. 903 (2001), involved a state program in Missouri whereby various private organizations "adopt" a stretch of highway by assuming responsibility for litter clean up. In return, the name of the organization is posted on signs along the stretch of the highway that is "adopted." The Ku Klux Klan asked to participate. Missouri refused to allow them to participate because the Klan has a racist viewpoint and because it was concerned that including the Klan would constitute racial discrimination by Missouri. *Cuffley*, 208 F.3d at 705.

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[3] Every other Circuit to address a similar issue has reached a similar result. *See, e.g. Brown v. Cal. Dep't of Transp.*, 321 F.3d 1217, 1221-25 (9th Cir. 2003) ("unpatriotic" messages must be allowed on highway overpass fence); *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997) (student organizations that advocate the non-traditional view of homosexuality must be funded); *Knights of the Ku Klux Klan v. East Baton Rouge Parish Sch. Dist.*, 578 F.2d 1122 (5th Cir. 1978) (issuing preliminary injunction prohibiting local school district from enforcing policy which excluded groups on the basis of viewpoint and remanding for further factual development). *See also Sons of Confederate Veterans v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002) (having allowed a private organization to participate in the State's special license plate program, State could not bar a particular design for the special plate). Thus, the decision below is significantly outside the mainstream of jurisprudence.

The Eighth Circuit held that the Klan must be allowed to participate despite its reprehensible views. In doing so, the Eighth Circuit recognized that a "State simply cannot condition participation in its highway adoption program on the manner in which a group exercises its constitutionally protected freedom of association." *Id.* at 709. Moreover, the Eighth Circuit recognized that merely "offering a service to a group that discriminates is not equivalent to discrimination in the offering of that service." *Id.* at 711.

If the First Amendment protects a group as extreme as the Ku Klux Klan, then surely it must protect an organization as mainstream as the Boy Scouts of America. The lower court's decision cannot be reconciled with *Cuffley*. Certiorari should be granted to resolve the conflict.

II. REVIEW SHOULD BE GRANTED TO CLARIFY WHETHER THE CONSTITUTION ALLOWS "INDIRECT" REGULATION OF FIRST AMENDMENT RIGHTS

Even if there were no split in the Circuits, the unique First Amendment analysis relied upon by the Second Circuit would justify review by this Court. As noted above, the lower court's decision turned on a distinction, unrecognized in this Court's jurisprudence, between direct and indirect regulation of First Amendment rights. Under the Second Circuit's rule, the government is permitted to indirectly regulate the speech of a private organization by denying the group access to a generally available government program because they hold disfavored beliefs. Under its view, government may not wield the weapon of direct coercion against an organization's viewpoint, but may nevertheless aim a different weapon at the same target by

denying equal access to any private group that does not conform its views to the political orthodoxy of the day.

The implications of such a distinction are breathtaking. Taken to its logical end, it means that the government can deny such things as tax exemptions, access to public facilities, and public funding to organizations that disagree with the current political majority. For example, the Roman Catholic Church might be told to ordain women priests or lose its tax exemption for church property. A political party might be told it must stop criticizing a Governor's proposal to raise taxes or lose the right to hold its conventions in a publicly owned arena. A student group at a public university might be told to abandon its criticism of the institution's admissions policies or lose the right to apply for student activities funds. In these examples, the government is not directly regulating viewpoints by directing that women must be ordained, that the Governor's tax proposal must be supported, or that institutional policies cannot be criticized. Rather, government is regulating indirectly by making access to a generally available government benefit dependent on the viewpoint of the beneficiary.

Moreover, the Second Circuit's endorsement of "indirect" regulation of First Amendment rights is in fundamental conflict with this Court's jurisprudence. For example, in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 895 (1995), this Court was confronted with a situation where a public university wished to deny funding to a particular student publication simply because of the student publication's editorial point of view. The public university was not directly regulating the student publication – it was not telling the publication what its editorial viewpoint should be or forcing it to

accept staff members who had a different view. Rather, the public university was *indirectly* regulating the publication by saying that as long as it maintained a certain viewpoint, it would not have access to generally available support from the University. Although this was only indirect regulation and, thus, would be acceptable under the Second Circuit's reasoning, this Court ruled that, having chosen to support student publications, the public university must support all of them regardless of the viewpoint espoused. *Id.* at 831-32.

Similarly, in *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), this Court was confronted with a situation where a school district wished to prohibit a private organization from showing a particular film in a school auditorium. The school district was not attempting to regulate the organization's speech directly – it was not telling them what to believe or even what films to show. Rather, it was regulating indirectly by making its ability to use the school auditorium to show films dependent on not showing films that reflected a particular viewpoint. Again, although this was clearly indirect regulation as the Second Circuit describes it, this Court ruled that the school district, having allowed the showing of films, must allow the organization to show the film of its choice. *Id.* at 393-94. *See also Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001) (public school cannot exclude religious group from using school facilities for meetings simply because the group advocated a religious perspective); *Speiser v. Randall*, 357 U.S. 513, 518 (1958) ("To deny exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech.").

If "a person may not be compelled to choose between the exercise of a First Amendment right and participation

in a viable public program," *Thomas v. Review Board*, 450 U.S. 707, 716 (1981), then surely Connecticut cannot regulate indirectly by forcing the Boy Scouts to choose between maintaining their current viewpoint, together with the policies by which they convey their message, and participating in Connecticut's state employee charitable campaign.

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be **Granted**.

Respectfully Submitted,

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IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA, *et al.*,
Petitioners,

v.

NANCY WYMAN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF *AMICI CURIAE* THE BECKET FUND FOR RELIGIOUS LIBERTY, THE CENTER FOR PUBLIC JUSTICE, THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, AND THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI*

Under Rule 37.5 of this Court, the Becket Fund for Religious Liberty respectfully submits this brief on behalf of itself and others as *amici curiae* in support of Petitioner.[1] The Becket Fund is a bipartisan and interfaith public interest law firm that protects the free expression of all religious traditions. The Becket Fund is frequently involved, both as counsel of record and as *amicus curiae*, in cases seeking to preserve the freedom of religious and other expressive organizations to pursue their missions without excessive government regulation and entanglement.

The Center for Public Justice is a national, public policy and civic education organization that advocates the equal treatment of all faiths in the public square. For over 25 years the Center has been advancing the case for the free exercise and non-establishment of religion in public as well as in private life.

The Ethics & Religious Liberty Commission is the Southern Baptist Convention agency charged with addressing the moral, ethical and religious liberty issues of our day. The Southern Baptist Convention is the largest non-Catholic denomination in the United States, with over sixteen million members in more than 42,000 local churches.

The Union of Orthodox Jewish Congregations of America ("U.O.J.C.A.") is the largest non-profit Orthodox Jewish umbrella organization in this nation, representing nearly 1,000 Jewish congregations throughout the United States. Through its Institute for Public Affairs, the U.O.J.C.A.

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[1] All parties have consented to the filing of this brief. A consent letter signed by the Petitioners and Respondents has been filed simultaneously with this brief. No counsel for any party authored this brief in whole or in part. No person or entity other than *amici* and its members made any monetary contribution to the preparation and submission of this brief.

researches and advocates legal and public policy positions on behalf of the Orthodox Jewish community. The U.O.J.C.A. has filed, or joined in filing, briefs with this court in many important cases affecting the Jewish community and American society at large.

STATEMENT OF THE CASE

The Boy Scouts of America and its local councils are private organizations that include religious belief and moral rectitude among their membership requirements. Their basic purpose is to convey and inculcate in young men a specific vision of morals and character. The Boy Scouts' vision requires limiting membership to persons willing to recognize God and refrain from avowing homosexuality. However, since this Court's holding in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), the Boy Scouts' particular viewpoint on religion and morals, expressed through its membership policies, has come under repeated assault by states and municipalities attempting to legislatively "overrule" this Court's decision. The State of Connecticut ("Connecticut") has joined this faction by specifically targeting the Boy Scouts and expelling them from its annual state employee charitable fundraising campaign ("Campaign")[2] in the name of Connecticut's "Gay Rights Law." *See* CONN. GEN. STAT. §§ 46a-81a—46a-81r.

Connecticut's Campaign is made generally available to organizations that fulfill "charitable and public health, welfare, environmental, conservation or service purposes." CONN. GEN. STAT. § 5-262. As such, the court below easily found that the Campaign constitutes a nonpublic forum and, absent a compelling justification, Connecticut may not discriminate against the Boy Scouts' viewpoint when conveyed through the forum. *Boy Scouts of America v. Wyman*, 335 F.3d 80, 91 (2d Cir. 2003). However, the court dodged the obvious

[2] The Campaign is governed by CONN. GEN. STAT. § 5-262.

implication of the Gay Rights Law on the Boy Scouts' ability to be free from viewpoint discrimination by describing this plainly targeted action as merely "differential adverse impact on . . . viewpoint . . . ." *Id.* at 93. Creating this new legal standard to justify such obvious viewpoint-based hostility has dire consequences on the ability of all expressive associations—and especially religious ones—to participate fully in the public square.[3]

I. THE LOWER COURT'S DECISION THREATENS THE FREE ASSOCIATION RIGHTS OF RELIGIOUS EXPRESSIVE ORGANIZATIONS.

Allowing the lower court's decision to stand would place a vast array of currently protected membership-based expressive associations at the mercy of the state. This danger is particularly menacing to religious organizations that regularly take (often unpopular) positions on the very same moral issues addressed by States' own discrimination laws. The Boy Scouts' unwavering stance on membership criteria, at least those related to sexual conduct and religious belief, has resulted in numerous lawsuits by activists and municipalities seeking to deny the Boy Scouts *any* access to state benefits and public fora.[4] The escalating attacks confronting the Boy Scouts are

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[3] The District Court below refused to apply the strikingly apposite (but opposite) holding of *Boy Scouts of America, South Florida Council v. Till*, 136 F. Supp. 2d 1295, 1310-11 (S.D. Fla. 2001) (Striking down a Florida school board's decision to "exclud[e] the Boy Scouts from Broward school facilities based on their anti-gay viewpoint"). The court never questioned the propriety of the *Till* decision but rather attempted to distinguish it by arguing that, unlike Connecticut, the school board in *Till* did not have a "state anti-discrimination statue back[ing] it up," only a county one. *Boy Scouts of America v. Wyman*, 213 F. Supp. 2d 159, 167 (D. Conn. 2002). Inexplicably, the Second Circuit simply ignores *Till* and only mentions the decision in a footnote concerning a purely ancillary issue. *Wyman*, 335 F.3d at 88 n.2.

[4] *See, e.g., Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003), *Evans v. City of Berkeley*, 127 Cal. Rptr. 2d 696

merely a foretaste of what awaits religious organizations unless this decision is corrected. If not, many expressive associations that choose to reflect any controversial views on abortion, female clergy, homosexual marriage, contraceptive medical coverage, and religious affiliation through their membership and hiring policies will risk having to change their messages or face an avalanche of lawsuits.

The Second Circuit's reasoning could easily be applied to a host of laws affecting expressive association. At least 43 states have general laws banning discrimination, primarily in public accommodations.[5] While some laws generally exempt

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(1st Cal. App. Dist. 2002), *Boy Scouts of America, South Florida Council v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001), *Curran v. Mount Diablo Council of the Boy Scouts of America*, 72 Cal. Rptr. 2d 410 (1992).

[5] ALASKA STAT. § 18.80.200 *et seq.* (Michie 1999); ARIZ. REV. STAT. § 41-1442 *et seq.* (2004); CAL. CIVIL CODE § 51 (Deering 1999); COLO. REV. STAT. § 24-34-601 (1999); CONN. GEN. STAT. § 46a-63 *et seq.* (1999); DEL. CODE ANN. tit. 6, § 4500 *et seq.* (1999); D.C. CODE ANN. § 2-1402.31 *et seq.* (2004); FLA. STAT. Ch. 760 *et seq.* (1999); HAW. REV. STAT. ANN. § 489-1 *et seq.* (Michie 1999); IDAHO CODE § 67-5901 *et seq.* (1999); ILL. COMP. STAT. ANN. Ch. 775 5/5-101 *et seq.* (1999); IND. CODE ANN. § 22-9-1-1 *et seq.* (Michie 1999); IOWA CODE § 216 *et seq.* (1997); KAN. STAT. ANN. § 44-1001 *et seq.* (1998); KY. REV. STAT. ANN. § 344.110 *et seq.* (Michie 1998); LA. REV. STAT. ANN. § 49:146 (West 1999); ME. REV. STAT. ANN. tit. 5, § 4552 *et seq.* (West 1998); MD. CODE ANN., Discrimination in Public Accommodation § 5 (1999); MASS. ANN. LAWS ch. 272, § 92(A) (Law. Co-op. 1999); MICH. S.A. § 37.2301 (2004); MINN. STAT. § 363A.11 *et seq.* (2004); MO. R. STAT. § 213.065 *et seq.* (2004); MONT. CODE ANN. § 49-2-101 *et seq.* (1999); NEB. R. STAT. § 20-132 (1999); NEV. REV. STAT. ANN. § 651.050 *et seq.* (Michie 2000); N.H. REV. STAT. ANN. § 354-A:1 *et seq.* (1999); N.J. STAT. ANN. § 10:5-4 *et seq.* (West 2004); N.M. STAT. ANN. § 28-1-1 *et seq.* (Michie 2000); N.Y. EXECUTIVE LAW § 291 *et seq.* (1999); N.D. CENTURY CODE § 14-02.4-14 (2004); OHIO REV. CODE ANN. § 4112.01 *et seq.* (Anderson 1999); OKLA. STAT. tit. 25, § 1401 *et seq.* (1999); OR. REV. STAT. § 659A.403 *et seq.* (2004); PA. CONS. STAT. tit. 43 § 952 *et seq.* (1999); R.I. GEN. LAWS § 11-24-1 *et seq.* (1999); S.C. CODE ANN. § 45-9-10 *et seq.* (1998); S.D. CODIFIED LAWS § 20-13-1 *et seq.* (Michie 2000); TENN. CODE ANN. § 4-21-102 *et seq.* (1999); UTAH CODE ANN. § 13-7-1 *et seq.* (1999); VT.

religious organizations from their anti-discrimination statutes,[6] including Connecticut's Gay Rights Law,[7] more limit that exemption only to certain kinds of accommodations,[8] or only to certain categories of discrimination.[9] Other states have no

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STAT. ANN. tit. 9, § 4501 *et seq.* (2000); VA. CODE ANN. § 2.2-3900B *et seq.* (2004); WASH. REV. CODE in § 49.60.010 *et seq.* (1999); W. VA. CODE § 5-11-1 *et seq.* (2000); WYO. STAT. ANN. § 6-9-101 (Michie 1999).

[6] *See* ARIZ. REV. STAT. § 41-1492.07 (1999); IDAHO CODE § 67-5910(1) (1999); KAN. STAT. ANN. § 44-1002(h) (1998); N.Y. EXECUTIVE LAW § 292(9) (1999).

[7] CONN. GEN. STAT. §§ 46a-81p, 46a-81q.

[8] *See* CONN. GEN. STAT. § 46a-64(b)(4) (1999) (exempting nursing homes "owned, operated by or affiliated with a religious organization"); IOWA CODE § 216.12(1) (1997) (exempting housing); ME. REV. STAT. ANN § 4573-A (exempting any "religious corporation, association, educational institution or society from giving preference in employment to individuals of its same religion . . . ."). N.J. STAT. ANN. § 10:5-5(l) (West 1999) (exempting "any educational facility operated or maintained by a bona fide religious or sectarian institution"); UTAH CODE ANN. § 13-7-2 (1999) (exempting "any institution, church, any apartment house, club, or place of accommodation which is in its nature distinctly private except to the extent that it is open to the public."); WASH. REV. CODE § 49.60.040(10) (1999) (exempting "any educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution . . . .").

[9] *See* IND. CODE ANN. § 22-9-1-3(q)(3) (Michie 1999) ("it shall not be a discriminatory practice for a private or religious educational institution to continue to maintain and enforce a policy of admitting students of one (1) sex only."); IOWA CODE § 216.7(2) (1997) ("This section shall not apply to (A) Any bona fide religious institution with respect to any qualifications the institution may impose based on religion . . . ."); LA. REV. STAT. ANN. § 49:146(A)(5) (West 1999) ("The provisions of this Section shall not prohibit any religious or private institution of elementary, secondary, or higher education from denying access to any area, accommodation, or facility on the basis of religion or sex."); MINN. STAT. § 363A.26 (2004) ("Nothing in this chapter prohibits any religious association, religious corporation, or religious society that is not organized for private profit, or any institution organized for educational purposes that is operated, supervised, or controlled by a religious

religious exemptions at all.[10] Moreover, whatever protection government grants can just as easily be taken away, but for the

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association, religious corporation, or religious society that is not organized for private profit, from: (1) limiting admission to or giving preference to persons of the same religion or denomination; or (2) in matters relating to sexual orientation, taking any action with respect to education, employment, housing and real property, or use of facilities."); NEB. REV. STAT. ANN. § 20-137 (Michie 1999) ("Any place of public accommodation owned by or operated on behalf of a religious corporation, association, or society which gives preference in the use of such place to members of the same faith as that of the administering body shall not be guilty of discriminatory practice."); N.H. REV. STAT. ANN. § 354-A:18 (1999) ("Nothing in this chapter shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or education purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained."); N.M. STAT. ANN. § 28-1-9(B) (Michie 2000) ("any religious or denominational institution . . . limiting admission to or giving preference to persons of the same religion or denomination . . . .").

[10] *See* ALASKA STAT. § 18.80.230 (Michie 1999); CAL. CIVIL CODE § 51 (Deering 1999); COLO. REV. STAT. § 24-34-601 (1999); DEL. CODE ANN. tit. 6, § 4502(1) (1999); D.C. CODE ANN. § 2-1402.31 (2004); FLA. STAT. Ch. 760.07 (1999); HAW. REV. STAT. ANN. § 489-2 (Michie 1999); 775 ILL. COMP. STAT. ANN. 5/5-103 (1999); KY. REV. STAT. ANN. § 344.130 (Michie 1998); MD. CODE ANN., Discrimination in Public Accommodations § 5 (1999); MASS. ANN. LAWS ch. 272, § 92(A) (Law. Co-op. 1999); MONT. CODE ANN. § 49-2-101(20) (1999); NEV. REV. STAT. ANN. § 651.050(2) (Michie 2000); N.D. CENTURY CODE § 14-02.4.-14 (2004); OHIO REV. CODE ANN. § 4112.02(G) (Anderson 1999); OKLA. STAT. tit. 25, § 1401 (1999); OR. REV. STAT. § 659A.403 (2004); 43 PA. CONS. STAT. § 954(l) (1999); R.I. GEN. LAWS § 11-24-3 (1999); S.C. CODE ANN. § 45-9-10 (1998); S.D. CODIFIED LAWS § 20-13-1(12) (Michie 2000); TENN. CODE ANN. § 4-21-102(15) (1999); VT. STAT. ANN. tit. 9 § 4501(8) (2000); W. VA. CODE § 5-11-3(j) (2000); WYO. STAT. ANN. § 6-9-101 (Michie 1999).

First Amendment.[11]

II. MEMBERSHIP POLICIES ARE INDISPENSABLE TO MESSAGE CONTROL IN EXPRESSIVE ASSOCIATIONS

The right to associate freely for the purpose of religious expression is essential:

> An individual's freedom to speak, *to worship*, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. . . . Consequently, we have long understood as

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[11] A particularly chilling result of applying anti-discrimination laws to institutions that espouse religious beliefs is that courts have put themselves into the position of independently evaluating whether the organization's beliefs are truly being violated by such application. *See Dale v. Boy Scouts of America*, 734 A.2d 1196, 1228 (N.J. 1999) ("Nothing before us, however, suggests that one of Boy Scouts' purposes is to promote the view that homosexuality is immoral."); *Pines v. Tomson*, 206 Cal. Rptr. 866, 877 (Cal. App. 2d Dist. 1984) ("Paragraph 1 simply enjoins appellants from refusing advertisements on the ground the person attempting to place an advertisement is not, or will not affirm that he is, a 'born-again' Christian. Thus, the religious purposes appellants have asserted for publishing the CYP are not impaired . . . ."); *E.E.O.C. v. Pacific Press Publishing*, 676 F.2d 1272, 1279 (9th Cir. 1982) ("Preventing discrimination can have no significant impact upon the exercise of Adventist beliefs because the Church proclaims that it does not believe in discriminating against women . . . ."); *Vigars v. Valley Christian Center*, 805 F. Supp. 802, 808 (N.D. Cal. 1992) (questioning whether being a pregnant single woman made an unfit role model at a religious school); *Diamond v. Congregation Kol Ami*, 1996 WL 942039 *6 (Chi. Com. Hum. Rel.) ("Kol Ami invites the Administrative Hearing Officer and this Commission to dismiss this case . . . when it made no effort to respect its own religious doctrine by ignoring the minimal qualifications for persons chosen to serve in positions of religious leadership.").

> implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, *religious*, and cultural ends.

Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) (emphasis added). Membership selection must be the touchstone for associational expression if "association" is to have any meaning at all. Membership criteria in expressive associations are expressive *in and of themselves* because, at a minimum, they define who can and cannot speak as part of the organization. *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring) ("[T]he formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice."). More than any bylaws or charters, the members of a group represent its fundamental nature; they *are* the association. When a voluntary association is predominantly engaged in expression, any outside interference with its membership necessarily alters the group's message. *Roberts*, 468 U.S. at 635-36 (O'Connor, J., concurring).

Associational rights are not second-class protections under free speech doctrine. They are, and must remain, robust. These rights are violated when the forced inclusion of an unwanted member would significantly alter the group's message. *See Dale*, 530 U.S. at 652. Such intrusion into group membership erodes the original group members' ability to advocate and retain the views that brought them together, nullifying their free association rights. *See Roberts*, 468 U.S. at 623. The First Amendment prevents government not only from punishing an association's message but also from imposing the equivalent of prior restraints through coerced membership.

Expressive association rights are not diminished, but are in fact *more* important, when a group's viewpoint is unpopular

with the government, as the Boy Scouts' is with the State of Connecticut. Free association and free speech rights are most crucial in the service of controversial causes because they provide what may be the only opportunity for those with minority views to effectively participate in both public and private discourse. *See New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 13 (1988) (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958)). It is essential for the maintenance of a free and open democracy that expressive association not be limited to causes deemed "proper" by the government, but be extended to all viewpoints. *See White v. Lee*, 227 F.3d 1214, 1227 (2000) ("The right to expressive association includes the right to pursue, as a group, discriminatory policies that are antithetical to the concept of equality for all persons.").

The Boy Scouts' membership policies and their commitment to community service both flow from the same source: a dedication to inculcating religious and moral values in young children through teaching and example. The Boy Scouts' membership policies are not only protected forms of speech but also are crucially related to its community service mission. Discriminating against them through the Gay Rights Law and subsequent restricted access to a forum for expression is not the equivalent of, as the Second Circuit puts it, "an ordinance against outdoor fires." *Wyman*, 335 F.3d at 94 (quoting *R.A.V. v. City of St. Paul,* 505 U.S. 377, 385 (1992)). The intent behind such a fire ordinance is to protect public safety, not to endorse a particular view on "dishonoring the flag" (and concomitantly to reject or disadvantage the opposite view). *Id.* The purpose behind the Gay Rights Law is explicitly to prevent "[s]exual orientation" from being "considered as a limiting factor," and therefore the State is clearly adopting a specific viewpoint on this moral issue. C.G.S.A. § 46a-81n(a). Through the application of its charitable campaign, it is rejecting an alternative viewpoint. The Second Circuit's analogy—and its revolutionary standard

for viewpoint discrimination—is flawed. The Court should not tolerate this dodge of *Dale*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA, *et al.*,

Petitioners,

v.

NANCY WYMAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, GENERAL COMMISSION ON UNITED METHODIST MEN OF THE UNITED METHODIST CHURCH AND NATIONAL CATHOLIC COMMITTEE ON SCOUTING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici are the largest religious sponsors of Scouting in America. Collectively, they charter tens of thousands of Scouting units serving over a million boys; their experience with Scouting at all levels is extensive. *Amici* support and employ the Scouting program of the Boy Scouts of America (the "BSA") as a means of religious ministry and outreach. They have a direct and profound interest in seeing that government is not permitted to discriminate against or disadvantage the BSA or its affiliated groups because of the BSA's constitutionally protected viewpoints or related membership policies. In *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), these *amici* submitted an *amici curiae* brief supporting the BSA's right to limit leadership positions to those whose expression, conduct, and values are consistent with Scouting's basic precepts. This Court held that an anti-discrimination law compelling the admission of an avowed homosexual as a Scout leader violated the BSA's First Amendment rights. *Id.* at 656, 659. In this case, *amici* join to support the BSA in seeking review of a decision allowing a transparent government end-run around *Dale*. *Amici* are deeply concerned that the decision below will have a significant adverse impact on the BSA and its sponsors throughout the nation. More broadly, the decision below threatens all religious organizations, like these *amici*, that have faith-based membership criteria.

1. *Amicus* The Church of Jesus Christ of Latter-day Saints sponsors over 399,000 Scouts and over 34,000

1. Counsel for *amici* state that they authored this brief in whole and that no person or entity, other than *amici*, made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of *amicus curiae* briefs.

Scouting units nationwide, making it the largest sponsor of Scouting in the United States.

2. *Amicus* General Commission on United Methodist Men of the United Methodist Church ("United Methodist Men") is the church-wide organization within the United Methodist Church authorized to oversee and coordinate the denomination's Scouting ministries. As the second largest sponsor of Scouting in the nation, the United Methodist Church sponsors over 397,000 Scouts and over 12,000 Scouting units.

3. *Amicus* National Catholic Committee on Scouting ("NCCS") oversees the Catholic Church's Scouting ministry. The purpose of the NCCS is to utilize and ensure the constructive use of the Scouting program as a viable form of youth ministry within the Catholic Church. Nationwide, Catholic dioceses, parishes, schools and churches sponsor and support approximately 332,000 Scouts and 9,700 Scouting units, making Catholic institutions the third largest sponsors of Scouts and Scouting units in the United States.

REASONS FOR GRANTING THE PETITION

The petition raises an issue of national scope and importance that richly warrants this Court's consideration. Scouting exists to develop certain character traits in boys through a program of adventure and education that is supportive of faith in God and traditional sexual morality. As this Court held in *Dale*, because Scouting is an expressive association the BSA's leadership and membership decisions are protected by the First Amendment against government interference. 530 U.S. at 656, 659. Since *Dale*, however, a widespread effort has arisen to use anti-discrimination laws

to expel the Boy Scouts from public facilities and programs because of their constitutionally protected policies regarding atheists and homosexuals. This case represents one such attempt. The State of Connecticut excluded the Boy Scouts from its State employee charitable campaign precisely because of such policies. Despite the participation of 900 organizations of every type in the campaign, the Second Circuit upheld the exclusion on the ground that the State has the power to condition the Scouts' participation on the relinquishment of their First Amendment rights so long as no direct compulsion is involved.

The decision below presents a serious threat to Scouting across the nation. To a great degree, Scouting depends on access to public facilities and lands to carry out its program of character education. Scouting is also benefitted in vital ways by its longstanding participation in various government programs that are broadly available to nonprofit civic and cultural institutions, such as the charitable campaign at issue here. The decision below would permit the government to exclude the Scouts and affiliated groups from a wide array of government facilities, lands, programs, and benefits unless they agree to forfeit their constitutional rights. More broadly, the decision creates serious concerns that government would likewise be able to discriminate against numerous religious organizations, like these *amici*, that have faith-based membership criteria.

I. The Decision Below Creates A Nationwide Threat To Scouting.

The decision below provides government at all levels with a legal justification and blueprint for using anti-discrimination laws to expel the Boy Scouts from numerous

public facilities, lands, and programs that are broadly available to other nonprofit organizations. It is increasingly clear that opponents of the BSA's beliefs and membership policies intend to use such tactics either to compel it to change its fundamental viewpoints or to exact a crushing price for resisting.

A. Like Many Other Nonprofit Organizations, the Boy Scouts Depend on Access to Public Facilities; Loss of Such Access Would Have a Serious Adverse Effect on Scouting.

The Scouting movement exists to instill in boys traditional values, practical skills, and the mores of good citizenship in a context of fun and adventure. *Dale*, 530 U.S. at 649-50. Among these values is a norm of conservative sexual morality, which is most effectively taught through the quiet examples of adult Scout leaders whose lives model that ethic. *See id.* at 651-55. Although the BSA itself is a national organization, the day-to-day work of teaching and modeling Scouting's precepts occurs at the local level – in Boy Scout Troops and Patrols, Cub Packs and Dens. Most who work in Scouting units (Troops and Packs) are unpaid volunteers, usually dads and moms. Scouting units are rarely well off. Many exist in difficult neighborhoods and serve underprivileged boys. They are commonly sponsored by local churches and other nonprofit organizations. Most units have limited resources, surviving on modest budgets with funds raised through car washes, popcorn sales, "Scout-O-Ramas," and appeals to fellow church members.

As a nonprofit association, the Boy Scouts depend on access to government-owned facilities, lands, and programs. Scout Troops often meet after hours in public school classrooms. With the cooperation of local officials, they visit fire

and police stations to learn about public safety, first aid and emergency preparedness, and city halls to learn about government and democracy. Boy Scout camping trips – which are fundamental to the Scouting program – typically involve the use of public lands, wilderness areas, or waters. The Sea Scouts depend on access to public marinas. Public parks are often the site of Scouting activities. And as this case illustrates, the BSA raises much needed funds through public employee campaigns. Many more examples could be given of instances where the Boy Scouts depend on public access.

In most cases, access to such government facilities and benefits is broadly available to nonprofit charitable organizations, sometimes at a discount or even free of charge. *See, e.g., Evans v. City of Berkeley*, 127 Cal. Rptr. 2d 696 (Cal. Ct. App. 2002), *review granted*, No. S11261 (Cal. 2003) (free berthing rights at marina available to nonprofit service organizations but denied to Scouts). Denying such access – or compelling payment of rates applicable to for-profit entities – would have a grave impact on the ability of Scouting units to function and even survive. For example, the Berkeley Sea Scouts have long served low-income youths of all races and backgrounds with their seamanship program. The City of Berkeley grants free berthing rights at the Berkeley Marina to service-oriented nonprofit organizations, and for over six decades the Sea Scouts had used the Marina without charge. *See id.* at 698, 700. However, the City recently revoked the Sea Scouts' free berthing rights under the same anti-discrimination rationale that the State used here. *See id.* at 698. As a result, the cost for the Sea Scouts to berth their ships rose from nothing to $21,000 per year. All but one of the Sea Scout vessels had to leave the Marina, and in the case of that vessel the volunteer skipper who once paid the cost of activities for low-income kids can no longer afford

to do so because he must pay the expensive berthing fee out of his own pocket. Consequently, activities have been significantly reduced and many disadvantaged youth have been forced to quit the Berkeley Sea Scout program. *See id.*, Clerk's Transcript on appeal to California Supreme Court, at 169, 271, 273-75. A similar result will occur anywhere that the Boy Scouts' access to public facilities is cut off or made prohibitively expensive.

B. Opponents of the BSA's Membership Policies Seek to Expel Scouting From Public Facilities.

Ideological opponents of the BSA's viewpoints regarding homosexual conduct and atheism are well aware that local Scouting units depend on access to public lands, facilities, and programs. Particularly since *Dale*, these opponents – both inside and outside government – have sought to retaliate against the Boy Scouts for their views by expelling them from these public venues or limiting their access. Cutting through the State's rhetoric, the instant case is one example of this phenomenon. Several others are reviewed in the petition (at 23-25). The obvious goal of this effort is to compel the Boy Scouts to abandon their viewpoints or, failing that, to exact a steep price for their refusal. This troubling strategy is acknowledged by activists.[2]

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2. *See* American Civil Liberties Union of San Diego and Imperial Counties, *Special Feature* (visited Feb. 2, 2004) <http://www.aclusandiego.org/boy_scouts/> (detailing efforts to expel the Boy Scouts from public facilities); Robert R. Raketty, *Letter to Portland Superintendent and School Board* (visited Feb. 2, 2004) <http://www.scoutingforall.org/aaic/2003101401.shtml> (letter to Portland public school officials from official of "Scouting for All" organization advocating against "[a]llowing the Boy Scouts of

(Cont'd)

C. In Direct Conflict With Established Precedent, the Decision Below Threatens the Viability of Scouting by Permitting the State to Exclude the Boy Scouts from Public Facilities and Programs that Are Broadly Available to Other Nonprofit Organizations Based on the Exercise of the BSA's Constitutional Rights.

The decision below directly conflicts with this Court's precedent by permitting the State to condition participation by the Scouts in the State employee charitable campaign on the relinquishment of the BSA's constitutional rights. The rule established below would allow government to manipulate anti-discrimination laws to exclude the Boy Scouts from numerous government benefits that are broadly available to other nonprofit organizations.

1. As this Court has stated, it is "beyond debate" that the "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the [Constitution]." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958); *Healy v. James*, 408 U.S. 169, 181 (1972) ("Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs."). The "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends" has long

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(Cont'd)

America . . . use of school facilities and [the] ability to recruit either in-person or through school mail . . . ."); *see also* Peter Ferrara, *The War on the Boy Scouts: The ACLU Never Sleeps*, The Weekly Standard, Sept. 29, 2003, Vol. 009, Issue 03 (noting organized efforts "to harass the Scouts and if possible drive them from the public sphere").

been a defining characteristic of American liberty. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). Throughout our history, this right has been "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Id.*

It is also well established that the First Amendment prohibits more than just targeted assaults on free speech and expressive association rights. *Dale*, 530 U.S. at 648 ("Government actions that may unconstitutionally burden this freedom may take many forms."). This Court in *Dale* specifically considered and rejected the argument that an anti-discrimination law had only an "incidental effect on protected speech" and thus did not merit strict judicial scrutiny. 530 U.S. at 659. Although the law at issue was generally applicable and viewpoint neutral on its face, and although it did not directly target the BSA's speech, this Court nevertheless held that it "directly and immediately *affects* associational rights, in this case associational rights that enjoy First Amendment protection." *Id.* (emphasis added). The "state interests embodied in New Jersey's public accommodations law" were insufficient, this Court held, to justify the "intrusion on the Boy Scout's rights to freedom of expressive association." *Id.*

Likewise, in *Elrod v. Burns*, 427 U.S. 347 (1976), this Court struck down patronage dismissals because "[t]he belief and association which government may not ordain directly are achieved by indirection." *Id.* at 359. The Court set forth the "exacting scrutiny" such abridgments must survive (*id.* at 362) and then stated that "*[t]his type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result*

of the government's conduct." *Id.* at 362 (emphasis added). That the burden on First Amendment rights is an incidental result of the government's policies is no justification.

A closely related principle is that government may not condition the receipt of benefits on the abandonment of First Amendment rights. That is no more constitutional than directly punishing the exercise of such rights. In *Speiser v. Randall*, 357 U.S. 513 (1958), California had established a rule conditioning a property tax exemption on the signing of a declaration stating that the person did not advocate the forcible overthrow of the United States government. This Court rejected the distinction between government directly punishing someone for exercising First Amendment rights and government denying benefits for refusing to give up such rights. *Id.* at 518 ("To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech.").

Since *Speiser*, this Court has repeatedly held in a variety of contexts that government cannot deny benefits because of the exercise of First Amendment rights – including the right of expressive association – nor condition the receipt of benefits on the relinquishment of such rights. *See Roberts v. Jaycees*, 468 U.S. 609, 622 (1984) ("Government actions that may unconstitutionally infringe upon [the right of expressive association] can take a number of forms" such as where the government "seek[s] to impose penalties or *withhold benefits from individuals because of their membership in a disfavored group*.") (emphasis added). In *Perry v. Sinderman*, 408 U.S. 593 (1972), for example, a university's board of trustees voted not to renew an untenured professor's contract because of his association with a group critical of the university's policies. Although the professor

had no right to university employment in the first place because he lacked tenure and his contract had expired, this Court nevertheless held that the university could not deny him employment because of his speech and associations:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech. *For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited.* This would allow the government to "produce a result which [it] could not command directly." Such interference with constitutional rights is impermissible.

Id. at 597 (internal citation omitted; emphasis added).

Similarly, in *Healy*, a university denied a student group official recognition because of its affiliation with a national group known for violent and disruptive tactics. With much the same rationale used by the State here, the university argued that the denial was constitutional because it had taken no direct action to restrict the group's rights and because the group remained free to advocate its views without university benefits. The Court rejected this argument:

> [T]he Constitution's protection is not limited to direct interference with fundamental rights.

> The requirement in [*NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)] that the NAACP disclose its membership lists was found to be an impermissible, *though indirect*, infringement of the members' associational rights. Likewise, in this case, the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President's action. We are not free to disregard the practical realities. Mr. Justice Stewart has made the salient point: "*Freedom such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.*" *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960).

408 U.S. at 183 (emphasis added).

This Court has applied the protections established in the foregoing decisions to diverse facts involving various types of government restrictions:

> [This Court's] unconstitutional conditions precedents span a spectrum from government employees, whose close relationship with the government requires a balancing of important free speech and government interests, to claimants for tax exemptions, *Speiser v. Randall*, 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958), users of public facilities, *e.g.*, *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 390-394, 113 S. Ct. 2141, 21462148, 124 L. Ed. 2d 352 (1993); *Healy v. James*, 408 U.S. 169, 92 S. Ct. 2338, 33 L. Ed. 2d 266 (1972), and recipients

> of small government subsidies, *e.g.*, *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984), who are much less dependent on the government but more like ordinary citizens whose viewpoints on matters of public concern the government has no legitimate interest in repressing.

Board of County Comm'rs v. Umbehr, 518 U.S. 668, 680 (1996); *see also Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995) (striking down denial of benefits for student religious publication); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (unconstitutional to deny religious club use of school facilities).

In brief, because "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights," this Court's "modern 'unconstitutional conditions' doctrine holds that the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit" in the first place. *Umbehr*, 518 U.S. at 674 (internal quotation marks and citations omitted). Government may not punish or withhold benefits from individuals or groups because of their political, social, or religious affiliations. As this Court held in *Roberts*, the First Amendment protects expressive associations – and the membership distinctions they must make to preserve and express their views – from government proscription, penalties, or retaliation. Government may interfere *only* if it "serve[s] compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 623.

2. The court below based its decision on the factual assumption that the BSA was ejected from the State campaign because of the exercise of its constitutional rights. Appendix to Petition ("App.") at 18a ("[W]e must assume that the removal of the BSA from the Campaign was triggered at least to some extent by the BSA's exercise of what the Supreme Court has held to be a constitutionally protected right."). Thus, the court's holding was that the State can constitutionally deny a nonprofit expressive association access to a government program that is broadly available to hundreds of other diverse nonprofit organizations specifically because of the exercise of its First Amendment rights. As explained above and in the petition, this holding creates an intolerable conflict with the entire line of unconstitutional condition cases.

The Second Circuit sought to distinguish between laws that directly compel an expressive association to admit someone who would interfere with its message and laws that merely force the association to "pay[] a price" for not admitting such persons. App. at 26a, n.8. But that is the very sort of direct vs. indirect distinction this Court rejected in cases like *Patterson*, *Healy*, and *Elrod*.

The court also attempted to draw a distinction between viewpoint discriminatory laws that aim at the suppression of ideas and those that impose a "differential adverse impact" on efforts to voice those ideas "through the medium of expressive association." App. at 20a-23a. It is noteworthy, however, that even Judge Calabresi, the author of the majority opinion, pronounced himself "skeptical of . . . [this] distinction." App. at 20a-21a, n.5 (writing for himself).[3] Indeed, the

3. Judge Calabresi instead intimated that the better approach would discard that distinction, acknowledge the government (Cont'd)

distinction makes no sense where a constitutional right precludes the government from prohibiting certain conduct in the first place but then the government conditions receipt of a broadly available benefit on the relinquishment of that right. Put differently, the distinction the court attempted to draw may make sense where the government has the right to ban the expressive conduct (*e.g.*, public flag burning) because the action it entails is unlawful under a viewpoint neutral and generally applicable law (*e.g.*, an ordinance prohibiting outdoor fires). *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 385 (1992). But the distinction fails where the expressive conduct itself (*e.g.*, adherence to the BSA's membership and adult leadership criteria) is protected by the First Amendment from government proscription. And it becomes utterly tenuous where the government demands not just that the expressive conduct cease but in effect that it be altered in a way that expresses a contrary message. That is exactly the case here.

Where the principal means of expressing and teaching a particular message is to model it through personal conduct, a ban on that conduct (or a condition that one engage in the opposite conduct) works to suppress (or outright change) the message. One can publically express hatred toward America in dozens of effective ways other than burning the American flag in violation of an outdoor fire ordinance. But if the prime way the BSA instills traditional sexual morality in boys is through the selection of adult leaders who are living examples of that norm, to punish the BSA for not selecting a leader who

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(Cont'd)
infringement on the freedom of association, and then determine whether the infringement can be justified under the compelling interest test. However, he (erroneously) felt himself bound by an approach that affords no protections from purportedly indirect burdens. *Id.*

exemplifies a different sexual norm is to punish it precisely for its viewpoint – indeed, for failure to express a contrary viewpoint. The effect is to penalize what may be the sole means of expressing a particular message.

3. The Second Circuit's holding creates a profound nationwide threat to the Boy Scouts. There is nothing in the court's decision that would prevent the use of anti-discrimination requirements to expel the Boy Scouts from numerous government facilities, properties, and programs to which many other nonprofit organizations enjoy access. To be sure, the government would have to be careful to base the exclusion on a general anti-discrimination law so as to avoid a claim of targeting, but such laws are increasingly common and easily characterized as necessary to protect against invidious discrimination. The reality, however, is that anti-discrimination laws can be manipulated to exclude disfavored expressive and cultural associations. That is especially true where the association (like the BSA) must make membership distinctions to define itself and teach its message.

Anti-discrimination laws typically bar discrimination based on race, national origin, ethnicity, sex, religion, and (increasingly) sexual orientation. However, as this Court noted in *Dale*, various governments also bar discrimination on such diverse grounds as "prior criminal record, prior psychiatric treatment, military status, personal appearance, source of income, place of residence, and political ideology." 530 U.S. at 656 n.2. The number of potential classes which the government can shield from discrimination is virtually limitless and thus can easily be gerrymandered to exclude or disadvantage disfavored groups.

The State in this case engaged in one such gerrymander in the application of its law. As the BSA has noted (Pet. at 4-7 & n.2; *see also* App. at 28a-29a & n.12), the State interpreted its anti-discrimination law to bar groups that discriminate in the selection of adult volunteers – thus excluding the BSA – but not those that discriminate in the provision of services or in youth membership – thus including both the BSA's ideological opponents on the homosexuality issue and less controversial discriminators like the Girl Scouts. But the law itself makes no such distinction – the State simply chose to interpret it that way. *See* App. 57a-61a (Connecticut anti-discrimination laws). The result was to bar the Boy Scouts because of their views on homosexuality while admitting everyone else. The court below reasoned this was merely the "price" the BSA had to pay for exercising its constitutional rights. App. at 26a, n.8.

And the Boy Scouts may pay a heavy price indeed if the decision below stands. The very real danger of the Second Circuit's rule is that it could be used to justify virtually unlimited exclusion of the Boy Scouts from access to all manner of government benefits because of the BSA's inability to comply with various anti-discrimination laws – including those relating to sexual orientation, atheism, sex, past criminal history, etc. If, as the court below held, access to broad-based government programs can be conditioned on forfeiting associational rights, it is difficult to see why government could not exclude the Boy Scouts from the after-hours use of government facilities, *contra Boy Scouts of America v. Till*, 136 F. Supp.2d 1295 (S.D. Fla. 2001) (rejecting that outcome), government-owned lands and waterways, and any other government-controlled place or program whose use can be governed by anti-discrimination laws. Indeed, if the court below is correct that the State's actions are viewpoint/content neutral, then exclusion of the Boy Scouts from

public forums might even be permissible in some instances. The decision below would allow governments across the nation to deny the Boy Scouts all manner of government benefits and access based on the exercise of their constitutional rights.[4]

II. More Broadly, The Decision Below Would Allow The Exclusion Of Faith-Based Nonprofit Organizations From Government Benefits, Facilities And Programs That Are Generally Available To Other Nonprofit Organizations.

The decision below has far-reaching implications beyond the Boy Scouts. If, under the Second Circuit's holding, the BSA can be excluded from government programs, benefits, and facilities because of its protected membership criteria, then there is a significant risk that numerous other groups – especially faith-based organizations like these *amici* – could

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4. This case does not involve a challenge to the eligibility requirements for receipt of a targeted government subsidy nor the requirements for securing a contract to provide specific government services. Of course, the government need not subsidize the exercise of constitutional rights. *See Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 546-51 (1983). And it is certainly free to set constitutionally permissible non-discrimination criteria for government contractors and agents. *See, e.g.*, 41 C.F.R. § 60-1.1 (equal opportunity requirement for federal contractors); Rehabilitation Act of 1973, 29 U.S.C. § 504. But those contexts are very different from the classic unconstitutional condition case where the government makes a benefit (*e.g.*, after-hours use of a government-owned building) broadly available to the public or to nonprofit organizations but then conditions the benefit for a disfavored participant on the relinquishment of a constitutional right. That is exactly what occurred in this case, where nearly a thousand diverse groups were allowed to participate but the BSA was excluded for refusing to give up its rights.

also be excluded.[5] In order to maintain their religious values and pursue their religious missions, religious organizations commonly have religious membership and leadership criteria. Such groups are defined by shared conceptions of God and common commitments to certain religious beliefs and values. The very nature of these organizations and their ability to preserve and express their faith depend on the right to "discriminate" in membership and leadership decisions. For obvious reasons, faith-based groups do not select atheists as their leaders or spokespersons, nor those whose ideology and conduct are fundamentally inconsistent with their core values.

At a time when government regulates and controls access to vast resources – from public lands and numerous important facilities to a wide array of benefits and programs – allowing government to condition access to such resources on faith-based organizations relinquishing their First Amendment rights would be exceptionally dangerous. Government need not coerce directly what it can obtain through a carrot and stick approach to government largess. The State can exert great pressure on religious organizations to abandon their defining characteristics and policies in exchange for access to government benefits. The Court has already rejected that result. *See Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995).

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5. Catholic institutions, for example, increasingly have become the target of governmental refusals to respect their constitutional rights. Based largely on Catholic religious teachings regarding the sanctity of human life, the sacramental nature of marriage between one man and one woman, and the reservation of the sacrament of Holy Orders to men, Church-related organizations have wrongly been branded "discriminators" by certain individuals and organizations that advocate public policies that conflict with Catholic religious beliefs and teachings.

Yet that is the inevitable outcome of the decision below. The Second Circuit permitted the State of Connecticut to exclude the Boy Scouts from participation in a program available to nonprofit groups of every imaginable description based on its constitutionally protected membership policies regarding homosexuals. The State could just as easily have excluded the Boy Scouts based on its policies denying leadership positions to atheists and the holding would have been exactly the same. The Second Circuit's decision might well authorize exclusion of religious organizations with faith-based membership criteria from government benefits, programs, and facilities that are generally available to all nonprofit organizations. The holding of the court below is contrary to established law and a direct threat not only to the BSA but also to faith-based organizations throughout the nation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 03-956

In The

Supreme Court Of The United States

BOY SCOUTS OF AMERICA and CONNECTICUT RIVERS COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

v.

NANCY WYMAN, in her capacity as Comptroller of the State of Connecticut and as a member of the Connecticut State Employee Campaign Committee, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

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QUESTION PRESENTED

Whether the courts below correctly applied the directly controlling precedent of *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788 (1985), to a record that those courts determined, as a matter of fact, "presented no evidence that the defendants applied Connecticut's Gay Rights Law in a viewpoint discriminatory manner." *Boy Scouts of America v. Wyman*, 335 F.3d 80, 97 (2d Cir. 2003).

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COUNTERSTATEMENT OF THE CASE

The opinion of the Court of Appeals for the Second Circuit and the record in this case contain important facts that have been omitted from the Petition. Those facts are as follows:

The State of Connecticut conducts an annual workplace charitable campaign ("Campaign"), as provided by the legislature under Conn. Gen. Stat. § 5-262.[1] *Boy Scouts of America v. Wyman*, 335 F.3d 80, 84 (2d Cir. 2003); Petitioners' Appendix (Pet. App.) 5a. The Campaign is administered by a committee whose membership is set by statute and includes State officers, employees and retirees, who comprise the only voting members of the committee. *Id.* The Campaign is conducted during business hours in State offices by State employees, who, among other things, distribute a campaign directory in booklet form, listing and describing the organizations in the Campaign. The State pays the salaries of committee members and other "loaned" State employees who conduct the Campaign during usual business hours. *Id.*; Conn. Agencies Regs. § 5-262-2; Resp. App. 7-A.

State employees may make contributions to the Campaign by authorizing a deduction from the bi-weekly payroll. The State Comptroller processes the deductions and transmits the sums deducted to a fund-raising organization, normally a United Way, which administers the collected Campaign monies. Conn. Gen. Stat. § 5-262(e); Resp. App. 4-A.

Connecticut law requires that all participants in the Campaign maintain a written policy of non-discrimination,

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[1] *See* Respondents' Appendix (Resp. App.) at 2-A.

including non-discrimination based on sexual orientation. 335 F.3d at 84; Pet. App. 6a; 63a. The petitioners, Boy Scouts of America and Connecticut Rivers Council, Boy Scouts of America (collectively "BSA"), have conceded that this provision is facially neutral. *See* Brief for Appellant at 35, *Boy Scouts of America, et al. v. Wyman, et al.*, 335 F.3d 80 (2d Cir. 1993)(No. 02-9000). Organizations participate in the campaign through "federations," which apply on behalf of the federations' members. Conn. Gen. Stat. § 5-262(1); Resp. App. 2-A; Conn. Agencies Regs. § 5-262-4; Resp. App. 7-A. In furtherance of the non-discrimination requirement, state regulations require the filing of an application by each parent federation that wishes to participate in the Campaign. 335 F.3d at 84; Pet. App. 6a; Conn. Agencies Regs. § 5-262-4; Resp. App. 7-A. Each federation must attest to the fact that each of its member organizations has an individual written policy of non-discrimination. That attestation is based on each member's individual Campaign application, which is filed with the federation. 335 F.3d at 84; Pet. App. 6a. The Campaign committee reviews all applications for compliance with State law, including, but not limited to, the non-discrimination requirement. *Id.* State law provides for removal of a parent federation or its members for failure to adhere to any of the eligibility requirements. *Id.*; Conn. Agencies Regs. § 5-262-5; Resp. App. 11-A. During the campaign in question, the committee excluded 29 other organizations because they did not establish compliance with the non-discrimination requirement. *Boy Scouts of America v. Wyman*, 213 F.Supp. 2d 159, 164 (D.Conn. 2002); Pet. App. 41a.

In its applications to participate in the Campaign, the BSA averred that it had a written policy of non-discrimination. 335 F.3d at 85; Pet. App. 6a-7a. However, after the Connecticut Commission on Human Rights and Opportunities ("CHRO"), in an unsolicited letter, informed

the Campaign committee that the New Jersey Supreme Court had ruled that the Boy Scouts practiced discrimination, the Campaign committee requested a clarification from the BSA of its attestation of a non-discrimination policy. 335 F.3d at 85; Pet. App. 7a. In a letter from the Scout Executive of the Boy Scouts' Connecticut Rivers Council, the BSA stated that "[i]f an individual does indicate that they [sic] are homosexual we can not register them." *Id.*

Because it was faced with the possible conflict between the BSA's original certification and its subsequent letter, the Campaign committee reached out for guidance from the CHRO, the state agency delegated the responsibility for enforcing and interpreting the state's anti-discrimination laws. The Campaign committee requested a declaratory ruling on whether the BSA's continuance in the Campaign would place the State in violation of any non-discrimination statutes that are directly applicable to activities conducted by the State. 335 F.3d at 85-86; Pet. App. 8a. While the BSA mischaracterizes the CHRO's and the committee's actions during this process as hostile toward the BSA's viewpoint, both the District Court and Court of Appeals, in its *de novo* review of the record created by the parties on summary judgment, determined that there was no evidence to support these characterizations. 335 F.3d at 96; Pet. App. 28a.

The CHRO ultimately ruled that if the BSA were retained in the Campaign, the State would be in violation of Connecticut's Gay Rights Law, which prohibits the State from becoming a party to any agreement, arrangement or plan which has the effect of sanctioning discrimination. Based upon the CHRO's declaratory ruling, the executive director of the committee, on advice of counsel, notified the BSA that it would not be able to participate in the Year 2000 Campaign. 335 F.3d at 86; Pet. App. 9a. The

removal was ratified by the committee.[2] A-274 and A-279[3] reprinted at Resp. App. 12-A to 14-A. The committee took no action to remove the BSA from the ongoing Year 1999 Campaign. A-297; Resp. App. 20-A.

In reviewing the organizations included in the Campaign, the Court of Appeals determined that there was no evidence in the record that any of those organizations, other than the petitioners, had discriminated in their membership or hiring policies with respect to sexual orientation or on any other basis. The Court stated:

> What the BSA gives us is a list of organizations that, by their names, would appear to target their *services* to persons of specific races, ethnicities, sexes, ages or sexual orientations. Despite being given ample opportunity to do so, however, the BSA presents no evidence that these groups actually have policies of discrimination or do discriminate in the provision of services. More significantly, the BSA fails to point to the slightest indication that these groups discriminate in their *membership or employment policies*, as opposed to their policies in providing services. [footnote omitted.] . . . We conclude that the BSA has presented no evidence that the defendants applied Connecticut's Gay Rights Law in a viewpoint discriminatory manner.

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2 The petitioners' statement that no vote was taken by the Committee to oust the BSA is therefore erroneous. *See* Petition at 7.

3 Numbers preceded by "A" refer to pages in the Joint Appendix submitted to the Court of Appeals.

335 F.3d at 96-97; Pet. App. at 29a-30a (emphasis in original). The District Court made a similar finding and conclusion. *See* 213 F.Supp. 2d at 168; Pet. App. at 48a-49a.[4]

REASONS FOR DENIAL OF THE PETITION

This Court clearly established the rules controlling the applicability of the First Amendment to the selection of charities for inclusion in government-operated workplace charitable campaigns in *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985). This case presents a straightforward application of *Cornelius* to undisputed facts. *Cornelius* holds that access to a governmental charitable campaign "can be restricted as long as the restrictions are reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id.* at 800 (internal punctuation omitted). Here the Second Circuit and the District Court concluded that the record established that the restrictions, as a matter of fact, satisfied those criteria of reasonableness and viewpoint neutrality. Contrary to the BSA's claim, there is no conflict between the BSA's First Amendment associational rights, affirmed by this Court in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000)("*Dale*"), and the state's right, affirmed in *Cornelius*, to apply reasonable viewpoint neutral criteria to its own workplace charitable campaign. The BSA is free to set its own membership policies, and the state is not attempting to force the BSA to give up its rights. Further, there is no circuit conflict on the issues in this case.

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[4] In footnote 8 of its Petition, the BSA inaccurately states that a participating organization, the Stonewall Foundation, "would exclude from membership and employment persons who espouse the view that homosexuality is immoral." The record does not support that assertion. *See* A-353; Resp. App. 21-A to 23-A.

1. This Court's Decision in *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985) Controls The Disposition Of This Case, Making Any Further Review Unnecessary.

In *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985), this Court held that a governmental workplace charitable campaign is a nonpublic forum and further held that the eligibility criteria for participation must be reasonable and viewpoint neutral to avoid violations of charitable organizations' First Amendment rights. There is no other decision of this Court pertaining to governmental charitable campaigns. *Cornelius* provides the appropriate standard by which Connecticut's campaign must be judged.

The Court of Appeals and the District Court both applied *Cornelius* and correctly concluded that (1) the Connecticut Campaign was a nonpublic forum[5] and (2) based on the factual record, its eligibility requirements, including, the mandated non-discrimination policy, were

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[5] Petitioners suggest that the Connecticut Campaign should be viewed as a limited public forum because it "has not reserved the Campaign 'for certain groups or for the discussion of certain topics.'" Pet. at 17, n. 7. Connecticut's Campaign, however, does not differ in any significant way from the federal worksite campaign in *Cornelius*, which this Court determined was a nonpublic forum. As this Court noted, "[t]he government did not create the [federal charitable campaign] for purposes of providing a forum for expressive activity. That such activity occurs in the context of the forum created does not imply that the forum thereby becomes a public forum for First Amendment purposes." *Cornelius*, 473 U.S. at 805. *See also Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 830 (1995) where this Court cited *Cornelius* as the standard for "forum analysis of [a] charitable contribution program."

reasonable and viewpoint neutral. Because these lower courts reviewed the case under the appropriate precedent and applied the test properly, no further review of this case is warranted.

The petitioners argue that Connecticut's actions violate the "unconstitutional conditions doctrine," as applied in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819 (1995). In fact, the *Cornelius* test plainly applies here, rather than the unconstitutional conditions test. It would make no sense to say that the state cannot, as a prerequisite for participation in a state charitable campaign, set any condition whatsoever that it could not otherwise constitutionally require of a private organization which was not seeking state support. If that were the rule, the state could not set reasonable viewpoint neutral requirements for participation in charitable campaigns, contrary to the holding of *Cornelius*. At any rate, even if the *Rosenberger* line of cases does apply in this situation, *Rosenberger*, like *Cornelius*, permits viewpoint neutral conditions. The Second Circuit, as noted above, held that Connecticut's Campaign conditions, as a matter of fact, were viewpoint neutral, and therefore also permissible under *Rosenberger*.

Further, the Second Circuit's decision in no way conflicts with this Court's decision in *Dale*. The Court of Appeals clearly recognized the BSA's constitutional right of expressive association to exclude a gay activist from a leadership position. 335 F.3d at 91; Pet. App. at 18a, 19a. The respondents have never tried to prevent the BSA from enforcing its membership or hiring policies. 335 F.3d at 95, n. 8; Pet. App. at 26a, n. 8. The BSA's claim to the contrary; Pet. at 17; is unsupported in the findings of the courts below. Similarly, the BSA's bald claim that the Court of Appeals' decision permits "indirect interference with rights of expressive association" in contravention of

Dale is unsupported. The BSA fails to cite to any part of the *Dale* decision to establish this contention. *See, e.g.*, Pet. at 11.

2. There Is No Factual Foundation For BSA's Claim Of Viewpoint Discrimination.

The BSA insists it was excluded from the Campaign because of its "constitutionally protected views and membership policies." Pet. at 11. While the petitioners continue to make this assertion, the Second Circuit found that "the BSA has not presented *any* evidence of viewpoint discrimination." 335 F.3d at 98; Pet. App. at 32a (emphasis added). The Court scrutinized the procedures applied to the determination to exclude the BSA, including the declaratory ruling proceedings at the CHRO, and concluded that the BSA's claims of a biased procedure "are purely speculative," that its evidence was "insufficient" and that it had "adduced no evidence that the hearing was fast-tracked" to precede this Court's issuance of its opinion in *Dale*. 335 F.3d at 96; Pet. App. at 28a.

As to the BSA's claim that the respondents removed it on the basis of its discriminatory practices while inconsistently allowing other alleged discriminators to remain in the Campaign, the Court reviewed the evidence in the record and concluded, "[t]he BSA, however, has presented no evidence that meets this description." 335 F.3d at 96; Pet. App. at 29a. The Court based this determination on its review of the 17 organizations, out of the 900+ appearing in the Campaign directory, which the BSA singled out as entities that practiced discrimination. 335 F.3d at 95-97; Pet. App. at 27a-30a; n. 10. While the Court observed that these agencies "appear to target their *services* to persons of specific races, ethnicities, sexes, ages or sexual orientations," the Court correctly observed that the BSA presented "no evidence that these groups actually

have policies of discrimination or do discriminate in the provision of services. More significantly, the BSA fails to point to the slightest indication that these groups discriminate in their *membership or employment policies*, as opposed to their policies in providing services." 335 F.3d at 96; Pet. App. at 29a (emphasis in original).

In sum, the Court of Appeals decision is strongly and clearly grounded in the detailed factual determinations made by that court.

3. There Is No Conflict With A Decision From Any Other Circuit.

There is no conflict between the decision below and a decision of any other court of appeals on the issue in this case, the application of the First Amendment to a workplace charitable campaign. The sole case on point is *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985), and it is that opinion which the Second Circuit and District Court squarely followed.

Petitioners attempt to manufacture a conflict between the Second Circuit decision in this case and decisions in other circuits.[6] The cases they rely on are inapposite. In *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000), *cert. denied sub nom. Yarnell v. Cuffley*, 532 U.S. 903 (2001), the Ku Klux Klan applied to participate in Missouri's Adopt-A-Highway program and was excluded. The state program was clearly a public forum, although the

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[6] The BSA also relies on district court and state court cases (Pet. at 23-25) to press its position that a conflict exists among the *circuits*. The cases cited are either consistent with the instant case and also rely on the analysis of *Cornelius*, the controlling precedent, or are factually distinct as to the type of forum under consideration.

Eighth Circuit neglected to say so. Further, contrary to the facts here, the *Cuffley* court made an actual finding that the state's purported "reasons for denying the Klan's application are so obviously . . . pretextual that . . . we are left only with the admitted reason . . . that the state disagrees with the Klan's beliefs and advocacy." *Id.* at 711. In other words, the *Cuffley* Court made a factual finding that the claimed viewpoint neutral actions of the state were a facade for discrimination. The BSA also erroneously relies on the public forum case, *Knights of the Ku Klux Klan v. East Baton Rouge Parish School Bd.*, 578 F.2d 1122 (5th Cir. 1978), involving the use of public school facilities. The Fifth Circuit did not address the constitutional issue on the merits and, in fact, remanded the case for more fact finding. But more importantly, in that case, in contrast to Connecticut's, the state court noted that the state admitted that it was barring a group because of its *advocacy* of racial and religious discrimination. *Id.* at 1125.

Petitioner's reliance on *Brown v. California Department of Transportation*, 321 F.3d 1217 (9th Cir. 2003); *Sons of Confederate Veterans, Inc. v. Commissioner of Virginia Department of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002) and *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997), to show circuit conflicts is even more tenuous. In each of those cases, the court found as fact that the government had engaged in viewpoint discrimination. While the outcomes of those cases were different than this case, there is no conflict among the circuit courts because the analyses are consistent with that of the Second Circuit.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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OPPORTUNITIES

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No. 03-956

In The

Supreme Court Of The United States

BOY SCOUTS OF AMERICA and CONNECTICUT RIVERS COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

v.

NANCY WYMAN, in her capacity as Comptroller of the State of Connecticut and as a member of the Connecticut State Employee Campaign Committee, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

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STATUTORY PROVISIONS

§ 5-262. State Employee Campaign. Deduction of contributions. Regulations. (a) As used in this section:

(1) "Federation" means a community chest or other organization which is incorporated as a nonstock corporation, is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States, as from time to time amended and consists of not less than ten affiliated agencies conducting a single, annual, consolidated effort to secure funds for distribution to its member agencies engaged in charitable and public health, welfare, environmental, conservation or service purposes.

(2) "Agency" means an organization which is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code of 1986, or any subsequent corresponding internal revenue code of the United States, as from time to time amended.

(3) "State Employee Campaign" means an annual campaign to raise funds from state employees for charitable and public health, welfare, environmental, conservation and service purposes.

(b) There is established a State Employee Campaign Committee consisting of: The Comptroller, or his designee; the Commissioner of Administrative Services, or his designee; the executive director of the Joint Committee on Legislative Management, or his designee; ten state employees appointed as follows: Four by the Governor, two of whom shall be a representative of organized labor, one by the speaker of the House of Representatives, one by the majority leader of the House of Representatives, one by

the minority leader of the House of Representatives, one by the president pro tempore of the Senate, one by the majority leader of the Senate and one by the minority leader of the Senate; two retired state employees, one appointed by the Governor and one appointed by the Comptroller; one nonvoting representative from each participating federation; and one nonvoting representative from the principal combined fund-raising organization selected pursuant to subsection (c) of this section. Not more than one state employee from any state agency shall be appointed to the committee. All voting members of the state employee campaign committee and their successors shall serve in accordance with the provisions of section 4-1a. The committee shall select one of its voting members to serve as chairperson.

(c) The State Employee Campaign Committee shall select a federation which has participated in the State Employee Campaign and has workplace campaign experience to administer the State Employee Campaign and shall supervise the campaign activities of such federation. The federation selected shall be referred to as the "principal combined fund-raising organization". If two or more federations request that the State Employee Campaign Committee select them to serve as the principal combined fund-raising organization, the State Employee Campaign Committee shall select a federation through a competitive process. During the fiscal year ending June 30, 1993, the committee shall also conduct a comprehensive review of the State Employee Campaign. Not later than July 1, 1993, and annually thereafter, the committee shall submit to the Governor and the General Assembly a report on the results of the most recently completed State Employee Campaign and recommendations for improvements in the upcoming campaign.

(d)(1) Each federation which did not participate in the most recently completed State Employee Campaign shall apply to the State Employee Campaign Committee not later than January fifteenth annually for approval to participate in the campaign. Such application shall contain information required by regulations adopted by the office of the Comptroller in accordance with chapter 54. The committee shall review such application and notify the federation of its decision not later than May fifteenth. A federation whose application is denied may appeal the decision of the committee in accordance with the procedures set forth in regulations adopted by the office of the Comptroller.

(2) On or before January fifteenth, each federation which participated in the most recently completed State Employee Campaign shall submit to the State Employee Campaign Committee a letter of intent to participate in the upcoming campaign. On or before April fifteenth, each such federation shall apply to the State Employee Campaign Committee for approval to participate in the campaign. Such application shall contain information required by regulations adopted by the office of the Comptroller in accordance with chapter 54. The committee shall review such application and notify the federation of its decision not later than May fifteenth. A federation whose application is denied may appeal the decision of the committee in accordance with the procedures set forth in regulations adopted by the office of the Comptroller.

(e) The Comptroller, upon written request of any state officer or employee, shall deduct, each pay period, from the salary or wages of such officer or employee the amount of money designated by such officer or employee for payment to the participating federation or federations indicated by the officer or employee. Upon collecting such deductions the Comptroller shall transmit them to the

principal combined fund-raising organization selected pursuant to subsection (c) of this section, together with a list of officers and employees contributing to each federation or its member agencies, provided the identity of officers or employees who have communicated in writing that they desire to remain anonymous shall not be so transmitted. Such organization shall, each month after receiving funds from the Comptroller, distribute the funds among the other federations, for distribution to the member agencies of the federations.

(f) Prior to the state campaign, the principal combined fund-raising organization shall submit for the approval of the State Employee Campaign Committee an itemized budget of anticipated administrative expenses, which shall not include campaign expenses. Following the state campaign, the principal combined fund-raising organization shall recover an amount not to exceed one hundred ten per cent of its preapproved actual administrative expenses from the gross payroll deduction receipts of the campaign in accordance with procedures set forth in regulations adopted by the office of the Comptroller. Undesignated funds raised through the campaign shall be distributed among the participating federations in proportion to the amount of funds designated for each federation.

(g) The principal combined fund-raising organization shall submit to the Auditors of Public Accounts for audit, and a copy to the office of the Comptroller, by March first annually, a financial report of its activities relating to the State Employee Campaign payroll deductions made during the previous calendar year.

(h) The Comptroller shall adopt regulations in accordance with the provisions of chapter 54 to carry out the purposes of this section. The regulations shall set forth

the competitive process by which the State Employee Campaign Committee shall select a federation to serve as the principal combined fund-raising organization and may include criteria for approval of federations applying under this section to participate in the State Employee Campaign.

REGULATIONS

Sec. 5-262-2. General provisions

(a) Participating federations may engage in workplace solicitation of state employees only in accordance with the procedures outlined herein.

(b) Employee solicitations shall be conducted during work hours using non-coercive methods t' at permit voluntary giving and reserve to the individual contributor the right to disclose any gift or keep it confidential.

(c) The solicitation period for the annual SEC shall be scheduled to allow timely processing of payroll deduction requests.

(d) At the discretion of the appointing authority, loaned state employees may volunteer to be assigned on a full or part time basis, for the specific period of time, to conduct or assist in the operation of the SEC. The employing state agency shall decide who will serve as a loaned employee and the length of the assignment. When assigned to the SEC, the loaned stated employee shall retain his salary and benefits.

(e) No federation will be allowed to participate in the SEC unless it and all its member agencies are in, compliance with the requirements of Section 5-262 of the Connecticut General Statutes and Sections 5-262-1 through 5-262-12, inclusive, of the regulations of Connecticut state agencies.

Sec. 5-262-4. Application process

(a) On or before January 15 annually, each federation seeking to participate in the SEC shall submit an application to the SECC c/o the Comptroller. The

application shall be in the form prescribed by the Comptroller and shall contain the following information:

(1) the name, address and telephone number of the federation;

(2) the name, address and telephone number of a person designated by the federation who the SECC may contact regarding the federation application;

(3) a list of member agencies, their telephone numbers and a 25 word description of each agency and the percentage of annual expenditures each agency used for fund-raising and administration;

(4) a document signed by an officer or the executive director of the federation, certifying the following:

(A) that the federation maintains on file the following documents for itself and for each member agency, and that it will produce at the federation's expense any such document(s) upon the written request of the Comptroller, the State Auditors or the SECC:

(i) Articles of Incorporation and current Bylaws;

(ii) evidence of tax exemption under IRS Section 501 (c) (3);

(iii) Certificate of Registration from the Connecticut Department of Consumer Protection, Public Charities Unit or, if exempt, a Certificate of Exempt Status;

(iv) most recent annual financial audit, or financial review, as provided under Section 5-262-3 (e) of the regulations of Connecticut state agencies and IRS Form 990 with all attachments;

(v) most recent annual report;

(vi) a list of officers and directors, giving names, addresses and defined roles;

(vii) a written policy of non-discrimination;

(viii) a statement affirming that there will be no unauthorized use of the SEC contributor lists and that no commissions or bonuses relating to the SEC have been or will be paid;

(ix) a statement affirming that publicity and promotional activities are truthful;

(x) a statement that funds will be used for the stated purposes of the federation and member agencies;

(xi) current operating budget;

(xii) a description of operations and services which includes information on the extent of contributor support and volunteer participation in the activities of the organization.

(B) that the federation and each member agency is in compliance with the eligibility standards set forth in Section 5-262 of the Connecticut General Statutes and Section 5-262-3 of the regulations of Connecticut state agencies.

(C) that the federation shall monitor the compliance of its member agencies and shall inform the SECC as soon as possible if any member agency fails to comply with any of the requirements of Section 5-262 of the General

Statutes or Sections 5-262-1 through 5-262-12, inclusive, of the regulations of Connecticut state agencies.

(D) that the federation and each member agency is up to date in its filing of annual financial reports required by state law.

(E) that the federation will maintain all documents listed in subsection (A) for a minimum of 3 years after the end of the fiscal year to which such document relates.

(b) The SECC shall select a committee comprised of three or more voting members ("the application review committee") which shall review all applications for completeness and for compliance with eligibility standards. The application review committee may request documents or information pertinent to its review from the applicant federation and from any member agency. The application review committee shall make its recommendations to the SECC. The SECC shall vote on each application and notify each federation of its decision in writing no later than April 15.

(c) Any federation whose application has been denied may request a hearing before the SECC to appeal the denial of its application. Such request for a hearing shall be in writing, and filed with the SECC within fifteen (15) days of receipt of the notice of denial. The SECC shall promptly schedule a hearing, and may request the federation to produce documents or information pertinent to the application and appeal. The SECC shall issue a decision on the appeal within 21 days of the hearing. The decision shall be in writing and shall state the reason(s) for its decision. The decision of the SECC shall be final.

Sec. 5-262-5. Withdrawal of eligibility

(a) In the event that a participating federation or member agency fails to adhere to the eligibility requirements or to the policies and procedures of the SEC, eligibility of such federation or agency may be withdrawn by the SECC. The SECC shall send written notification to the federation and agency of the specific reasons for the withdrawal of eligibility.

(b) The federation or agency or both may appeal the withdrawal of eligibility by filing a written appeal with the SECC within ten (10) working days after receipt of such notification. The SECC shall provide the appealing federation or agency a hearing within ten (10) working days of the receipt of the notice of appeal, unless by mutual consent the parties agree to a different date for such hearing. The SECC may request the federation or agency to produce documents or information pertinent to the appeal. The SECC shall issue a decision on the appeal within 21 days of the hearing. The decision shall be in writing and shall state the reason(s) for its decision. The decision of the SECC shall be final.

(c) If a member agency's eligibility to participate in the SEC is withdrawn by the SECC, the federation may not distribute any funds raised in the SEC to such agency.

Q That Sunday was Mother's Day and then on Monday, May 15th these letters were sent to the various United Way organizations, correct?
A Correct.
Q The letters that went out, the purpose of these letters were to notify the United Way organizations that the committee was denying the application to participate in the year 2000 campaign with respect to the participation of the Boy Scouts of America?
A Correct.
Q When did the committee make that decision?
A In fact the committee had not met yet. We didn't meet until after the fact on this.
Q So is it fair to say that on May 15, 2000, the committee had not yet decided to deny the applications of the United Way organizations with respect to the participation of the Boy Scouts of America?
A Correct. The committee did not meet on this yet. It was sent out prior to our meeting. We met after the fact.
MR. ROTHMAN: Make a note that counsel is conferring with the witness.

BY THE WITNESS:
A It was ratified after the fact. Just so you have that information.
Q Aren't you running a risk that the committee will reach a contrary decision?
A Sure.
Q What would you have done if that happened?
A Whatever the committee ruled and what the committee decided.
Q But did you expect the committee to ratify this letter?
A Yes, I would say I believed they would.
Q Why did you expect them to do that?
THE WITNESS: Excuse me.
MR. ROTHMAN: Would you indicate that the witness is conferring with counsel.
BY THE WITNESS:
A The-- I conferred with our legal counsel regarding this letter. We had a deadline date of May 15th in which we had to notify the charities if they are not being allowed into the campaign. So we had to send the notification out by May 15th to make that deadline.

Q When did you confer with counsel?
A I don't remember if it was the 12th or the 15th. I'm not really sure. I don't remember.
Q Was it after the commission's ruling?
A Yes. Because if I remember correctly, I don't think they initially sent a copy to me.
Q How did you learn about the commission's ruling?
A I believe I got a call from our attorney to tell us the decision was out.
Q You are referring to Mr. Prensky?
A Mr. Prensky, yes.
Q When did you receive that call?
A I don't remember if it was the 12th or 15th. I don't remember the timing on that.
Q What is the basis of that May 15 deadline that you mentioned?
A I remember having to look at them at the time, but we-- there's a deadline of when all the applications have to be in, there's a deadline as to when we review the applications and there's a deadline as to when we have to send the letter out informing them if they are not-- if any of the federations-- informing the

federations if they or their member charities aren't going to make it into the campaign and May 15th was the deadline for that.

Q Prior to May 15th, 2000, had the committee discussed what action it would take in response to the CHRO's ruling?

A No, I don't recall that we did. But I'm not sure.

Q When you sent out this letter on May 15th, were you concerned that the committee might not ratify the letter?

A No. At the time I don't believe I even thought that there was anything else to do but to get the letter out in time. I wasn't even thinking about what the committee would think after the fact.

Q Were you concerned that the committee might decide to allow the Boy Scouts of America to participate in the campaign?

A No, I didn't even think about that one way or the other.

Q Did you think based on the committee's May 12th decision that the campaign was obligated to exclude the Boy Scouts from the campaign?

A After conferring with our legal

Q Do you need to have the question read back?
A No. The question was clear to me, I just needed to make sure I wasn't violating any attorney-client privilege.
But it was based-- the answer to that is it was based on the advice of our attorney, Bill Prensky.
Q What Mr. Prensky advised you after May 12th was that you were bound by the CHRO's ruling?
MR. PRENSKY: I'm going to direct her not to respond based on the attorney-client privilege.
MR. ROTHMAN: Why don't we mark this as Plaintiff's Exhibit 64 (sic) a copy of the action summary from the May 22nd, 2000 meeting.
Exhibit 66.
(Plaintiff's Exhibit 66 was marked for identification: Action summary of May 22, 2000.)
BY MR. ROTHMAN:
Q Do you recognize Plaintiff's Exhibit 66 as the action summary from the May 22nd, 2000

committee meeting?
A Yes, it was a special meeting. Yes, I do.
Q Was a special meeting called for the purpose of discussing the May 15 letter?
A Correct.
Q Just to clarify for the record, the May 15 letter was marked as Plaintiff's Exhibit 59.
A Okay. Yes.
Q You need to give an audible response so that the court reporter can take it down.
A Okay.
Q At this meeting you told those present that Attorney Prensky had told you that the committee was bound by the CHRO ruling and that it was necessary to notify the Boy Scouts that they were denied participation in the campaign.
A That's correct.
Q There was a motion made to ratify the May 15 letter?
A Correct.
Q Motion was withdrawn so that the committee could seek legal advice?
A Correct.

Q When was the May 15, 2000 letter ratified?
A I don't remember the date. It was after this, though. I don't recall the date.
Q Was it ratified?
A Yes.
Q Did you say anything else regarding the Boy Scouts letter and the CHRO declaratory ruling?
A I don't recall anything other than what's here.
Q What concerns were voiced that led to the motion being withdrawn?
A The concern that was voiced was the fact that they wanted legal counsel present for the whole discussion so that they could ask questions if they had any.
Q Was that the only concern that was voiced?
A Pretty much, from what I recall. It was just that they wanted to be able to hear everything that was said and ask a question if it came up rather than asking it-- have it be asked somewhere and then come back and give the information. They wanted to be able to be there

so other questions can be voiced. As one person thinks of a question, sometimes somebody else thinks of another one because of the first question asked. So they wanted to have legal counsel present for the whole thing.

Q Were you concerned that the ratification of your May 15 letter was being put off until another day?

A I knew at some point we would come to a decision one way or the other, so I wasn't concerned. Either they ratified it or they didn't. I knew the vote would come at some point, so I wasn't really overly concerned about it.

Q Or did you think there was-- did you think there was a possibility that the committee would vote not to ratify your letter?

A I knew there was a possibility, sure. I mean a vote can go either way. People either vote for something or vote against it.

Q What would have been the effect on the campaign if having sent the letter on May 15, it was then not ratified at some-- some time in June?

A We would have just sent out another

So in May of 2000, the United Way was collecting for the campaign, the 1999 campaign deduction-- payroll deductions; is that correct?

A That would be correct.

Q So to back up, the committee, did it not vote to drop the Boy Scouts from the 2000 campaign?

A Correct.

Q Did the committee take any action with regard to the 1999 campaign which was being collected in May 2000 when these e-mails were written?

A I don't believe so.

Q They took no action with regard to the ongoing campaign; is that correct?

A Yeah, I don't believe we did anything at all--

MR. ROTHMAN: I object to the-- leading the witness. It's almost as if you are testifying. I mean it's okay if you want to establish some preliminary things, but I think it's improper to lead her once you've had that established.

MR. PRENSKY: That's on the record.

MR. ROTHMAN: Why don't we take a one minute break.

(Recess taken at 12:29 p.m.
Reconvened at 12:30 p.m.)

BY MR. ROTHMAN:

Q As far as you are aware, has NARAL ever accepted a member who was opposed to abortion rights?

A I don't know.

Q Has the Stonewall Foundation ever except a member who was opposed to gay or lesbian rights?

A Not knowingly.

Q If they knew, they wouldn't accept that person as a member?

A We wouldn't include that person in our activities speaking or educating the public.

Q Would you accept that person as a member of the Stonewall Foundation?

A The membership in Stonewall Foundation is not clearly defined, so I'm hesitating to answer that question. Membership in the--

Q But you wouldn't let that person participate in the activities conducted by the Stonewall Foundation?

A We wouldn't let that person speak or represent the Stonewall Foundation, if they were put on a public forum or event, we would have no restrictions or limits on who would attend.

MR. ROTHMAN: I have no further questions.

Ms. Parker and Mr. Prensky have a right to ask questions as does your own counsel should any of them choose to.

MS. MURPHY: I just want to clarify, just for the record, that Ms. Brett is not a plaintiff in the Cornerstone Pool case. She's a complainant at the CHRO level. There is a Superior Court case in which all of the complainants are defendants. I just want to clarify that for the record. I have no questions.

CROSS-EXAMINATION

BY MS. PARKER:

Q I have just a few questions. Ms. Brett, when you were a commissioner, when would Commission, as a body, approve minutes from previous meetings?

A At a subsequent commission meeting.

Q You testified earlier about State

Pride, does that organization exclude heterosexuals from membership?
A No, actually, it doesn't.
Q Does Stonewall Foundation exclude heterosexuals from membership?
A No.
Q Does the Connecticut coalition for lesbian, gay, bisexual, transgender civil rights exclude heterosexuals from membership?
A No.
Q Do any of the other groups that you've identified earlier in your testimony as lesbian and gay groups exclude heterosexuals from membership?
A No.
MS. PARKER: I have no further questions.
CROSS-EXAMINATION
BY MR. PRENSKY:
Q Actually, I do have a couple questions. Ms. Brett, when you were commissioner at the CHRO, were the regular meetings of the Commission open to the public?
A Yes.
Q You just testified that at the regular

(13)

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BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, CAMPUS CRUSADE FOR CHRIST INTERNATIONAL, INTERVARSITY CHRISTIAN FELLOWSHIP/USA, REJOYCE IN JESUS CAMPUS FELLOWSHIP, CHRISTIAN MEDICAL AND DENTAL ASSOCIATION, NATIONAL ASSOCIATION OF EVANGELICALS, IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a state government's removal of the Boy Scouts from a forum in which they had participated for 30 years because of the Scouts' moral viewpoint and leadership policies unconstitutionally interferes with freedom of expressive association under *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000), and discriminates on the basis of viewpoint under *Rosenberger v. Rector & Visitors of University of Virginia,* 515 U.S. 819 (1995).

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INTEREST OF THE *AMICI CURIAE*[1]

Amicus curiae **Christian Legal Society** ("CLS") is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors that has student chapters at 165 law schools across the country, including approximately 70 state law schools. Numerous CLS student chapters have been threatened with denial of equal access to meeting space and student activity funding, because university officials deem that the student groups discriminate on the basis of religion and sexual orientation. Before becoming a member of CLS, a person must sign a statement of faith that he or she agrees with certain basic Christian tenets regarding the nature of God and the authority of the Bible.[2] The CLS student chapter constitution provides that "officers must exemplify the highest standards of morality as set forth in Scripture, abstaining from 'acts of the sinful nature' (Galatians 5:19-21), including fornication, adultery, and homosexual conduct (Exodus 20:14; Matthew 15:19; Romans 1:27; 1 Corinthians 6:9-10)."

Amicus curiae **Campus Crusade for Christ International** ("CCC") has student chapters meeting at 731 universities and colleges across the country, including student chapters at 417 public universities and colleges. The purpose of CCC is to fulfill the Great Commission,

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[1] Counsel for a party did not author this brief, in whole or in part. No one, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation and submission of the brief. *See* S. Ct. Rule 37.6.

[2] The specific statements of faith are set forth in the Appendix with the more detailed statements of interest of the *amici curiae*.

Jesus' command to His disciples to "go and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to obey everything I have commanded you." *Matthew* 28:19-20. Specifically, the goal of its student chapters is to reach every student at their campuses every year with the Gospel. Its leaders are to be effective witnesses of the Gospel to other students. At numerous public universities, CCC student groups have been threatened with denial of equal access to meeting space and funding because they set religious criteria for their leadership.

Amicus curiae **InterVarsity Christian Fellowship/USA** ("IVCF") has as its purpose to establish and advance at colleges and universities witnessing communities of students and faculty who follow Jesus as Savior and Lord: growing in love for God, God's Word, God's people of every ethnicity and culture and God's purposes in the world. IVCF carries out its ministry through student chapters. Officers of those chapters are required to subscribe to the purpose and doctrinal basis of IVCF and must subscribe to certain basic biblical truths of Christianity. Currently, IVCF has approximately 747 chapters on 552 campuses in the United States, including chapters at 290 public universities and colleges. Many IVCF student chapters at public universities have been threatened with denial of equal access to meeting space and funding because they set religious criteria for their leadership.

Amicus Curiae **Christian Medical and Dental Association** ("CMDA") was founded in 1931 and today represents over 16,000 members – primarily practicing physicians representing the entire range of medical specialties. These members share a common commitment to the principles of biblical faith and the integration of

those principles with professional practice. CMDA has approximately 160 student chapters at university and college campuses, public and private. Some CMDA student chapters have been threatened with denial of equal access to meeting space and funding because of their religious criteria for their leadership.

Amicus curiae **ReJOYce in Jesus Campus Fellowship** ("RJCF") has student chapters at 23 universities and colleges, including student chapters at 14 state universities and colleges. Its purpose is to promote the teachings of Jesus Christ according to the Holy Bible through Bible study, campus activities and service to the campus community. While welcoming all students to attend its meetings, its voting members must subscribe to the group's Doctrinal Statement of Commitment to Historic Christianity, as well as agree to live by the group's written standards of personal conduct. RJCF student chapters have been threatened with denial of equal access to meeting space and funding because of their religious criteria for their leadership.

Amicus curiae **National Association of Evangelicals** ("NAE") is a nonprofit association of evangelical Christian denominations, churches, organizations, institutions, and individuals that includes more than 50,000 local churches from 74 different denominations and serves a constituency of over 20 million people. The NAE is committed to defending religious freedom as a precious gift of God and a vital component of our American heritage.

Pursuant to Rule 37.2(a), blanket consent to the filing of amicus briefs in support of either party was filed with

the Clerk of the Court by counsel for petitioners and counsel for respondents on January 20, 2004.

SUMMARY OF ARGUMENT

Student religious organizations' right of equal access to campus facilities, including student activity funding, frequently is challenged by public university officials who seek to condition student religious organizations' access upon their agreeing to accept as officers persons who do not share their core religious values. These university officials typically claim that student religious organizations (including *amici's* student chapters) violate university policies prohibiting discrimination on the basis of religion or sexual orientation, because the organizations require their officers to subscribe to a statement of faith and to live according to biblical standards of conduct, including sexual conduct. If, despite this Court's decision in *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000), Boy Scouts may be excluded from a state employees' charitable fundraising program because it will not allow homosexual persons to be leaders, then *amici's* student chapters will face increased coercion by public universities to forfeit *either* their First Amendment right to choose leaders who share the groups' core religious values *or* their First Amendment right of equal access to student activity funding and meeting space, despite this Court's holdings in *Rosenberger v. University of Virginia,* 515 U.S. 819 (1995) (religious student group has equal access right to university funding program), and *Widmar v. Vincent,* 454 U.S. 263 (1981) (religious student group has equal access right to meet on university campus).

For over two decades, the Second Circuit has sanctioned government officials' viewpoint discrimination against speakers expressing traditional religious viewpoints, despite this Court's decisions requiring viewpoint neutrality. *See, e.g., Good News Club v. Milford Central School,* 533 U.S. 98, 109 n.3 (2001) ("remarkable that the Court of Appeals majority did not cite *Lamb's Chapel,* despite its obvious relevance to the case"), *rev'g,* 202 F.3d 502 (2d Cir. 2000) (permitting viewpoint discriminatory denial of equal access to religious community group to public school facilities); *Lamb's Chapel v. Center Moriches Union Free School District,* 508 U.S. 384 (1993), *rev'g,* 959 F.2d 381 (2d Cir. 1992) (same); *Board of Education v. Mergens,* 496 U.S. 226, 239 (1990) (upholding Equal Access Act, 20 U.S.C. §§ 4071-74 (2003), enacted in response to *Brandon v. Guilderland Bd. of Ed.,* 635 F.2d 971 (2d Cir. 1980) (requiring public high school officials to deny equal access to student religious group)). The decision below again ignores this Court's requirement of viewpoint neutrality.

Decisive action by this Court will prevent yet another round of litigation to protect the right of religious student groups to have equal access to university facilities, including student activity funding, free from viewpoint discrimination by university officials. The First Amendment right of religious student groups to require that their leaders affirm their core religious values, without forfeiting their First Amendment right of equal access to university facilities and student activity funding, is threatened if the decision below is allowed to stand.

ARGUMENT

I. PUBLIC UNIVERSITIES HAVE THREATENED RELIGIOUS STUDENT GROUPS WITH LOSS OF ACCESS TO CAMPUS FACILITIES AND STUDENT ACTIVITY FUNDING IF THE GROUPS REFUSE TO AGREE TO ACCEPT AS OFFICERS PERSONS WHO DO NOT SHARE THE GROUPS' CORE RELIGIOUS VALUES, INCLUDING THEIR RELIGIOUS VIEWPOINTS REGARDING HOMOSEXUAL CONDUCT.

A. The Nationwide Problem will be Exacerbated by the Decision Below.

Since 1993, *amici's* student chapters have been threatened with loss of equal access, including student activity funding, at campuses across the country, including public universities and colleges in New York, Vermont, Florida, North Dakota, Iowa, Oklahoma, Michigan, Illinois, Ohio, Minnesota, Missouri, Georgia, California, Arizona, and Texas. Typically, the student groups have been forced to threaten litigation in order to protect their right of access guaranteed by this Court in *Widmar v. Vincent,* 454 U.S. 263 (1981), and *Rosenberger v. University of Virginia,* 515 U.S. 819 (1995).

Essentially, many state universities have tried to force a new orthodoxy upon student religious organizations: all student groups must accept homosexual conduct, and the advocacy of such conduct, as a morally correct (or at least, a morally neutral) choice. State universities have sought to enforce policies prohibiting discrimination on the basis of sexual orientation against student groups whose religious principles teach that "homosexual behavior [is] a sin that disqualifies those who practice it from membership or leadership within the group." Stephen M. Bainbridge,

Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act, 21 J.C. & U.L. 369 (1994). For example, the University of Illinois denied recognition to the Christian Legal Society ("CLS") chapter at the College of Law because the CLS student leaders "refused to sign a University pledge to refrain from discrimination on the basis of sexual orientation," although recognition was eventually restored. *Id.* at 370.

University officials have launched a separate, but related, attack against *religious* student groups that discriminate on the basis of *religion* in the selection of their officers. For example, Georgia Institute of Technology threatened not to recognize a student chapter of ReJOYce in Jesus Campus Fellowship because it required its voting members to affirm its statement of faith. The Georgia Attorney General issued an opinion advising that the university's failure to recognize the religious student group would violate the group's free speech rights. Ga. Op. Att'y Gen. 97-32 (1997).

Similarly, the University of Minnesota Law School threatened to deny recognition to the CLS chapter because it required its voting members and officers to subscribe to its statement of faith. The University judged this to be "discrimination on the basis of religion" in violation of the University's Equal Opportunity statement, although it eventually relented. Michael Stokes Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups,* 29 U.C. Davis L. Rev. 653, 668-672 (1996).

Another student religious group recently filed suit against the University of Minnesota challenging its requirement that a religious student group adopt the university's nondiscrimination policy in order to be recognized for access to meeting space and funding. The group refuses: 1) to sign a statement that it will not "discriminate" on the basis of religion or sexual orientation and 2) to state in its constitution that its membership is open to all students regardless of religion or sexual orientation. *Maranatha Christian Fellowship v. Board of Regents of the University of Minnesota System, et al.,* No. 03-CV-5618 (D. Minn. filed Oct. 24, 2003). Without recognition, the religious group will not be able to meet on campus or apply for student activity funding.

Currently, the CLS chapter at the Ohio State University ("OSU") is threatened with denial of equal access, including funding and meeting space, due to its religious criteria for officers. The controversy began this fall when a member of a gay, lesbian, bisexual and transgender student group at OSU's Moritz College of Law filed an official complaint with the administration seeking de-recognition of the CLS student chapter, alleging such recognition violated the university's nondiscrimination policy. The CLS chapter's constitution requires its officers and members to sign a statement of faith and specifies that its "officers must exemplify the highest standards of morality as set forth in Scripture, abstaining from 'acts of the sinful nature' (Galatians 5:19-21), including fornication, adultery, and homosexual conduct (Exodus 20:14; Matthew 15:19; Romans 1:27; 1 Corinthians 6:9-10)." *Form Bylaws for Christian Legal Society Chapter, Student Chapter Manual 2003-2004*, App. 2, pp. 1-4 (2003). *See* Jeff Polesovsky, *GLBT Group Files Formal Complaint Against*

CLS, The Lantern, November 18, 2003, *at* http://www.thelantern.com/main.cfm?include=detail&storyid=560959. University officials initially indicated its recognition would be withheld; however, under threat of lawsuit, the university temporarily reinstated recognition, pending a 90-day process to consider the chapter's request that the university amend its written policy to provide: "The creed, religion and sexual orientation components of this policy shall not apply to a religious organization with respect to the organization's selection of members and officers." *See* Jeff Polesovsky, *Society Awaiting Ruling by University: Proposed Change would Give Religious Exemption,* The Lantern, January 30, 2004, *at* http://www.thelantern.com/news/593203.html?mkey=1185690.

If de-recognized, the CLS chapter will lose meeting space and access to two sources of student activity funding: 1) the $300-$500 that every student organization automatically receives from the university upon annual renewal of its recognition, and 2) Student Bar Association ("SBA") funding from a separate law student activity fees fund available only to recognized law student groups. The SBA threatened to exclude the CLS chapter from its student activity funding, although threat of lawsuit has caused it to await the university's final decision regarding recognition. *See* Jeff Polesovsky, *Student Bar Association Threatened with Lawsuit,* The Lantern, November 18, 2003, *at* http://www.thelantern.com/main.cfm?incldue-detail&storyid=560961. The university student newspaper has called upon university officials to deny recognition to the CLS chapter and to launch an "investigation into the constitutions of all students groups." *Legal Troubles: Christian Society Discriminates,* The Lantern, November

12, 2003, *at* http://www.thelantern.com/main.cfm?include=detail&storyid=555292.

Amici emphasize that their meetings are open to all persons. They do not exclude persons who have homosexual inclinations, or who have engaged in homosexual conduct in the past, from serving as officers. As long as the individuals now agree that homosexual *conduct* is sinful and that they will abstain from engaging in or advocating such conduct, they may be eligible to serve as leaders. University officials, however, have generally refused to define the term "sexual orientation" to include only "orientation." Instead university officials insist that "sexual orientation" reaches far beyond "inclination" to the protection and advocacy of homosexual conduct.

Ironically, university officials violate their own policies against discrimination on the basis of religion when they penalize a *religious* group for selecting leaders who adhere to the group's core *religious* values. While university officials would immediately recognize that environmental groups want only leaders who are pro-environment, and Students Against Drunk Drivers do not want leaders who misuse alcohol, they seem oblivious to the paradox of using a policy against *religious* discrimination to prohibit a *religious* group from defining itself by its *religious* convictions.

The First Amendment protects the right of student religious organizations to determine their own criteria for selection and retention of leaders. Were that not the case, university officials would have *carte blanche* to reshape student organizations to reflect the government's values and message. This Court eloquently warned against this danger in *Rosenberger,* when it wrote:

> The . . . danger . . . to speech from the chilling of individual thought and expression . . . is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition. . . . For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.

515 U.S. at 835-36 (citations omitted). *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 579 (1995) ("The Speech Clause has no more certain antithesis" than "a proposal to limit speech in the service of orthodox expression.").

Because it allows government officials to condition access upon a group's forfeiture of its right to select its leaders in accordance with its viewpoint regarding homosexual conduct, the decision below will exacerbate the problem faced by student religious organizations nationwide.

B. Religious Student Groups Risk a Heavy Penalty for Exercising Their First Amendment Right to Select Leaders Who Share Their Religious Viewpoints.

Despite this Court's decision in *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000), university officials have continued to pressure religious student organizations to relinquish their right to determine their groups' leadership qualifications. If recognition is denied, student groups forfeit numerous benefits and incur numerous harms,

including: 1) loss of equal access to campus facilities (Paulsen, *supra,* at 670); 2) loss of equal access to student activity funds (*id.*; Bainbridge, *supra,* at 384); 3) stigmatization as a discriminatory organization (*id.*); 4) loss of reduced rental rates for university facilities (Paulsen, *supra,* at 670); 5) prohibition of on-campus fundraising activities (Bainbridge, *supra,* at 385); 6) loss of reduced advertising rates in the campus newspaper (Paulsen, *supra,* at 670); and 7) imposition of a chilling effect on "conducting publicly-visible activities on University grounds for fear that doing so would lead to the imposition of further sanctions" (Bainbridge, *supra,* at 385).

Religious student groups have refused to amend their constitutions to include university mandated language regarding discrimination on the basis of religion or sexual orientation for the following reasons:

> 1. The affirmative right of religious student groups to determine the qualifications of the persons who plan and lead their meetings is a critical component of the equal access right because the leaders determine the content of those meetings and lead the group in worship, prayer and Bible study;
>
> 2. The active commitment of its leaders to its core values is essential to the implementation of those values through the group's meetings and other activities (Bainbridge, *supra,* at 384; Paulsen, *supra,* at 671);
>
> 3. In a very real sense, *leaders are the message,* the visible representatives of the group to the campus community, frequently addressing campus issues on behalf of the organization and serving as the liaison between university officials and the group;

4. Statements of faith in a group's constitution are important expressions of the group's collective identity to the greater campus community (Paulsen, *supra,* at 670-71);

5. Governmental coercion – or at best, governmental bribery – to recant commitment to particular religious convictions is wrong in and of itself (*id.*); and

6. A group may fear "hostile takeovers" or even "silencing" by persons who do not share the group's core values (*id.,* at 671 n.39).

Essentially, the current controversy at Ohio State University *may* be an attempt by a homosexual advocacy group to shutdown an evangelical Christian group because of its competing viewpoint regarding the morality of homosexual conduct. Fear of silencing or hostile takeovers is a realistic apprehension for small, unpopular groups whose election process might be easily hijacked by persons who oppose their message or whose viewpoints other groups might wish to censor.

Indeed, the potential for guerilla warfare among student organizations is enormous under the decision below. Persons who do not share an organization's core values may apply for leadership positions with nothing to lose. If they are accepted into leadership, they can use their positions to change the organization's ideology; if they are rejected, they can disqualify the organization from a significant source of funding.

The chilling effect on speech is substantial if religious student groups elect leaders under the threat that each election may result in a challenge to its recognition, access, and funding. Any disgruntled office seeker could trigger a university review of the internal elections of an

organization to ensure that the elections had been conducted in a "nondiscriminatory" manner. *Cf., Corporation of Presiding Bishop v. Amos,* 483 U.S. 327, 336 (1987) ("[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission.").

C. Denial of Equal Access to Religious Groups Because They Require Their Officers Not to Engage in or Advocate Homosexual Conduct Violates This Court's Decisions in *Widmar v. Vincent,* 454 U.S. 263 (1981); *Rosenberger v. University of Virginia,* 515 U.S. 819 (1995); *Boy Scouts of America v. Dale,* 530 U.S. 640 (2000); and *Board of Regents v. Southworth,* 529 U.S. 217 (2000).

The right of religious student groups to meet on public university campuses is protected by this Court's decisions in *Widmar v. Vincent,* 454 U.S. 263 (1981), and *Rosenberger v. University of Virginia,* 515 U.S. 819 (1995). In *Widmar,* this Court prohibited public university officials from denying equal access to student groups engaging in religious speech. Notably, the *Widmar* university officials had not denied *all* access to religious groups but instead *conditioned* their access to campus facilities on their agreeing to abstain from religious worship or religious teaching at their meetings. 454 U.S. at 265, 266 n.3. This Court held that such a condition violated a religious student group's freedom of speech as well as its freedom of association. *Id.* at 269, 277.

In *Rosenberger,* this Court applied its *Widmar* analysis to reject university officials' denial of equal access to

student activity funds for a student publication simply because its viewpoint was religious. 515 U.S. at 834-837. Although the student funding program was a "forum more in a metaphysical than in a spatial or geographic sense . . . the same principles [prohibiting viewpoint discrimination] are applicable." *Id.* at 830.

The *Widmar/Rosenberger* equal access right is endangered, however, by university officials' attempts to obstruct access by religious student groups by conditioning their right of access on their agreeing not to discriminate on the basis of religion or sexual orientation in the selection of their officers. When a state university threatens to withdraw recognition of a religious student group because its leadership decisions are based on its religious convictions, the university "engage[s] in very nearly the precise conduct that *Widmar* forbids: discrimination on the basis of a group's religious nature and membership." Paulsen, *supra,* at 675. It makes little sense to recognize a constitutional right of equal access by a religious group, but simultaneously to deny a religious group the right *to be religious* in its message and its leadership.

Remarkably, by engaging in this viewpoint discrimination, university officials expose the entire student activity funding program to constitutional challenge. In *Board of Regents v. Southworth,* 529 U.S. 217, 221, 233-34 (2000), this Court upheld a public university's imposition of a mandatory student activity fee "if the program is viewpoint neutral." *Id.* at 221. The Court explained:

> The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent.

Id. at 235. *See also Gay Lesbian Bisexual Alliance v. Pryor,* 110 F.3d 1543 (11th Cir. 1997) (university officials committed viewpoint discrimination by denial of funding to student group in favor of homosexuality). By denying access to a student activity funding program to groups that disapprove of homosexual conduct while funding groups that favor homosexual conduct, university officials take the program out of the protection of *Southworth* and expose it to constitutional challenge from all students who object to their money being used to fund organizations with which they have political, ideological, or religious disagreements. As a matter of constitutional law and fairness, either the religious student organizations must have viewpoint neutral access to the funding program, or objecting students must be refunded their mandatory fee, or the program should be terminated. *See Southworth,* 529 U.S. at 229-30, 232-35.

Nor may university officials justify their viewpoint discrimination by claiming it is necessary to "forbid [] acts of discrimination toward certain classes" in order "to produce a society free of the corresponding biases." *Hurley,* 515 U.S. at 578. This Court has deemed "decidedly fatal" such governmental restructuring of an organization's purposes and values, rejecting the government's argument that:

> Requiring access to a speaker's message would thus be not an end in itself, but a means to produce speakers free of the biases, whose expressive conduct would be at least neutral toward the particular classes, obviating any future need for correction. But if this indeed is the point of

> applying the state law to expressive conduct, *it is a decidedly fatal objective.*

Id. at 578-79 (citations omitted) (emphasis added).

University officials' attempts to coerce orthodoxy on religious student groups are as constitutionally objectionable today as were the "loyalty oaths" in the 1950s or universities' denial of access to radical student groups in the 1970s. *See Healy v. James,* 408 U.S. 169 (1972) (public university officials conditioning recognition upon a student group's abandonment of its advocacy of violence and disruption violated both free speech and association). This Court long ago determined that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia v. Barnette,* 319 U.S. 624, 642 (1943).

II. AS THE DECISION BELOW DEMONSTRATES, THE SECOND CIRCUIT CONTINUES TO RESIST THIS COURT'S REQUIREMENT THAT EQUAL ACCESS BE GRANTED WITHOUT VIEWPOINT DISCRIMINATION.

For a quarter century, the Second Circuit repeatedly has approved government officials' viewpoint discrimination against speakers expressing traditional religious viewpoints, frequently influencing other circuits to approve viewpoint discrimination. For example, the Second Circuit's decision in *Brandon v. Guilderland Board of Education,* 635 F.2d 971 (2d Cir. 1980), *cert. denied,* 454

U.S. 1123 (1981), triggered nationwide suppression of high school students' extracurricular religious speech when other circuits followed its lead.[3] The national damage inflicted by the Second Circuit's *Brandon* decision on high school students' religious speech necessitated an Act of Congress, the Equal Access Act, 20 U.S.C. §§ 4071-74 (2003), and a decision by this Court, *Board of Education v. Mergens,* 496 U.S. 226 (1990), to restore equal access for high school students. As this Court noted, the Equal Access Act was "enacted in part in response to" the Second Circuit's *Brandon* decision. 496 U.S. at 239, *citing* S. Rep. No. 98-357 at 6-9, 11-14 (1984) (describing *Brandon*'s negative effect).

Likewise, in *Good News Club v. Milford Central School,* 533 U.S. 98, 109 n.3 (2001), this Court took to task the Second Circuit for its "remarkable" and "incredible" failure to apply this Court's equal access precedent. Specifically, the Second Circuit ignored *Lamb's Chapel v. Center Moriches Union Free School District,* 508 U.S. 384 (1993), in which this Court unanimously reversed the Second Circuit's approval of school officials' viewpoint discriminatory denial of equal access to public school

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[3] *See Garnett v. Renton Sch. Dist.,* 865 F.2d 1121, 1124-27 (9th Cir. 1989) (relying on *Brandon* to hold Equal Access Act unconstitutional), *vacated,* 496 U.S. 914 (1990), *on remand,* 987 F.2d 641 (9th Cir.) (relying on *Mergens* to uphold Equal Access Act), *cert. denied,* 510 U.S. 819 (1993); *Bender v. Williamsport Area Sch. Dist.,* 741 F.2d 538, 551-57 (3d Cir. 1984) (citing *Brandon,* Establishment Clause trumps free speech right to meet of high school religious student group), *vacated on jurisdictional grounds,* 475 U.S. 534 (1986); *Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist.,* 669 F.2d 1038, 1045-46 (5th Cir. 1982) (relying on *Brandon* to hold unconstitutional school district policy permitting equal access to religious student groups).

facilities for a religious community group. *Id., rev'g*, 959 F.2d 381 (2d Cir. 1992). Despite this Court's ruling in *Lamb's Chapel*, the Second Circuit subsequently upheld school officials' viewpoint discriminatory denial of equal access against a religious community group in *Good News Club v. Milford,* 202 F.3d 502 (2d Cir. 2000). Reversing the Second Circuit, this Court found "it remarkable that the Court of Appeals majority did not cite *Lamb's Chapel,* despite its obvious relevance to the case." *Good News Club,* 533 U.S. at 109 n.3.

Decisive action by this Court will prevent yet another round of litigation to protect the right of religious student groups to have equal access to university facilities, including student activity funding, without viewpoint discrimination by university officials. If the decision below is allowed to stand, the First Amendment right of religious student groups to require that their leaders affirm their core religious values, without forfeiting their First Amendment right of equal access to university facilities and student activity funding, will come under intensified attack.

CONCLUSION

For the reasons above, *amici* respectfully suggest that this case is one of the exceptional cases in which it would be appropriate for the Court to grant the petition for a writ of certiorari and summarily reverse the ruling of the court below. In the alternative, *amici* respectfully request that the petition for a writ of certiorari be granted and the case set for argument before this Court.

Respectfully submitted,

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February 5, 2004

APPENDIX

Statements of Interest of the *Amici Curiae*

The **Christian Legal Society**, founded in 1961, is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at over 165 law schools. Numerous CLS student chapters have been threatened with denial of equal access to meeting space and student activity funding, because university officials deem that the student groups discriminate on the basis of religion and sexual orientation.

Since 1975, the Society's legal advocacy and information division, the Center for Law and Religious Freedom, has worked for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in the Supreme Court of the United States and in state and federal courts throughout this nation.

Members of Christian Legal Society must sign the following Statement of Faith:

Trusting in Jesus Christ as my Savior, I believe in:

- One God, eternally existent in three persons, Father, Son and Holy Spirit.
- God the Father Almighty, Maker of heaven and earth.
- The Deity of our Lord, Jesus Christ, God's only Son, conceived of the Holy Spirit, born of the Virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return.

- The presence and power of the Holy Spirit in the work of regeneration.
- The Bible as the inspired Word of God.

The CLS student chapter constitution provides that "officers must exemplify the highest standards of morality as set forth in Scripture, abstaining from 'acts of the sinful nature' (Galatians 5:19-21), including fornication, adultery, and homosexual conduct (Exodus 20:14; Matthew 15:19; Romans 1:27; 1 Corinthians 6:9-10)."

The Center strives to preserve religious freedom in order that men and women might be free to do God's will. Using a network of volunteer attorneys and law professors, the Center provides information to the public and political branches of government concerning the interrelation of law and religion. Since 1980, the Center has filed briefs *amicus curiae,* in defense of individuals, Christian and non-Christian, and on behalf of religious organizations in virtually every case before the Supreme Court involving church/state relations.

The nation's Declaration of Independence "instituted a new government" by first announcing that it was "laying its foundations on [immutable] principles." One of these "self-evident truths" was that all persons are divinely endowed with rights that no citizen may divert nor government abridge. Among such inalienable rights are those enumerated in – but not conferred by – the First Amendment, the foremost of which is religious freedom. Because the source of religious freedom as acknowledged in the Declaration of Independence, is the Creator, not a constitutional amendment, statute, or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of federal, state, or

local government. This nation has no higher duty than to protect inviolate its full and unimpaired enjoyment. Hence, the unequivocal and non-negotiable prohibition attached to this our First Freedom is "Congress shall make no law. . . ."

The Christian Legal Society's national membership, years of experience, and available professional resources enable it to speak with authority upon religious freedom matters before this Court.

Amicus Curiae **Campus Crusade for Christ International** ("CCC") has student chapters meeting at 731 universities and colleges across the country, including student chapters at 417 public universities and colleges. The purpose of CCC is to fulfill the Great Commission, Jesus' command to His disciples to "go and make disciples of all nations, baptizing them in the name of the Father and of the Son and of the Holy Spirit, and teaching them to obey everything I have commanded you." *Matthew* 28:19-20. Specifically, the goal of its student chapters is to reach every student at their campuses every year with the Gospel. Its leaders are to be effective witnesses of the Gospel to other students. At numerous public universities, CCC student groups have been threatened with denial of equal access to meeting space and funding because they set religious criteria for their leadership.

Campus Crusade for Christ International has the following Statement of Faith:

The sole basis of our beliefs is the Bible, God's infallible written Word, the 66 books of the Old and New Testaments. We believe that it was uniquely, verbally and fully inspired by the Holy Spirit, and that it was written without error (inerrant) in the original manuscripts. It is the

supreme and final authority in all matters on which it speaks.

We accept those areas of doctrinal teaching on which, historically, there has been general agreement among all true Christians. Because of the specialized calling of our movement, we desire to allow for freedom of conviction on other doctrinal matters, provided that any interpretation is based upon the Bible alone, and that no such interpretation shall become an issue which hinders the ministry to which God has called us.

We explicitly affirm our belief in basic Bible teachings, as follows:

1. There is one true God, eternally existing in three persons – Father, Son and Holy Spirit – each of whom possesses equally all the attributes of Deity and the characteristics of personality.

2. Jesus Christ is God the living Word, who became flesh through His miraculous conception by the Holy Spirit and His virgin birth. Hence, He is perfect Deity and true humanity united in one person forever.

3. He lived a sinless life and voluntarily atoned for the sins of men by dying on the cross as their substitute, thus satisfying divine justice and accomplishing salvation for all who trust in Him alone.

4. He rose from the dead in the same body, though glorified, in which He lived and died.

5. He ascended bodily into heaven and sat down at the right hand of God the Father, where

He, the only mediator between God and Man, continually makes intercession for His own.

6. Man was originally created in the image of God. He sinned by disobeying God; thus, he was alienated from his Creator. That historic fall brought all mankind under divine condemnation.

7. Man's nature is corrupted, and he is thus totally unable to please God. Every man is in need of regeneration and renewal by the Holy Spirit.

8. The salvation of man is wholly a work of God's free grace and is not the work, in whole or in part, of human works or goodness or religious ceremony. God imputes His righteousness to those who put their faith in Christ alone for their salvation, and thereby justifies them in His sight.

9. It is the privilege of all who are born again of the Spirit to be assured of their salvation from the very moment in which they trust Christ as their Savior. This assurance is not based upon any kind of human merit, but is produced by the witness of the Holy Spirit, who confirms in the believer the testimony of God in His written Word.

10. The Holy Spirit has come into the world to reveal and glorify Christ and to apply the saving work of Christ to men. He convicts and draws sinners to Christ, imparts new life to them, continually indwells them from the moment of spiritual birth and seals them until the day of redemption. His fulness, power and control are appropriated in the believer's life by faith.

11. Every believer is called to live so in the power of the indwelling Spirit that he will not fulfill the lust of the flesh but will bear fruit to the glory of God.

12. Jesus Christ is the Head of the Church, His Body, which is composed of all men, living and dead, who have been joined to Him through saving faith.

13. God admonishes His people to assemble together regularly for worship, for participation in ordinances, for edification through the Scriptures and for mutual encouragement.

14. At physical death the believer enters immediately into eternal, conscious fellowship with the Lord and awaits the resurrection of his body to everlasting glory and blessing.

15. At physical death the unbeliever enters immediately into eternal, conscious separation from the Lord and awaits the resurrection of his body to everlasting judgment and condemnation.

16. Jesus Christ will come again to the earth – personally, visibly and bodily – to consummate history and the eternal plan of God.

17. The Lord Jesus Christ commanded all believers to proclaim the gospel throughout the world and to disciple men of every nation. The fulfillment of that Great Commission requires that all worldly and personal ambitions be subordinated to a total commitment to "Him who loved us and gave Himself for us."

In response to God's love, grace and truth: The purpose of **InterVarsity Christian Fellowship/USA** is to establish and advance at colleges and universities witnessing communities of students and faculty who follow Jesus as Savior and Lord: growing in love for God, God's Word, God's people of every ethnicity and culture and God's purposes in the world.

Each member of the Board of Trustees, Staff and any Council of Reference, as a qualification of office, as the case may be, shall subscribe, at the time of election or before taking office and yearly thereafter, to her or his belief in the Doctrinal Basis of the fellowship, which shall be the basic biblical truths of Christianity, including:

(a) The unique Divine inspiration, entire trustworthiness and authority of the Bible.

(b) The Deity of our Lord Jesus Christ.

(c) The necessity and efficacy of the substitutionary death of Jesus Christ for the redemption of the world, and the historic fact of His bodily resurrection.

(d) The presence and power of the Holy Spirit in the work of regeneration.

(e) The expectation of the personal return of our Lord Jesus Christ.

InterVarsity carries out its ministry through student chapters. Officers of those chapters also are required to subscribe to the purpose and doctrinal basis. Currently, there are about 747 such chapters on 552 campuses in the United States. (Of these campuses, 250 are private institutions, 290 are public, and the status of 12 is unknown.) InterVarsity follows biblical procedure to deal with

suspected moral or doctrinal deviation. Many IVCF student chapters at public universities have been threatened with denial of equal access to meeting space and funding because they set religious criteria for their leadership.

This Doctrinal basis and procedure has resulted in conflict on at least 18 campuses, primarily on the campus institution's claim of violation of campus codes prohibiting discrimination on the basis of religion or sexual orientation.

Amicus Curiae **Christian Medical and Dental Association** ("CMDA") was founded in 1931 and today represents over 16,000 members – primarily practicing physicians representing the entire range of medical specialties. These members share a common commitment to the principles of biblical faith and the integration of those principles with professional practice. CMDA has approximately 160 student chapters at university and college campuses, public and private. Some CMDA student chapters have been threatened with denial of equal access to meeting space and funding because of their religious criteria for their leadership.

Amicus curiae **ReJOYce in Jesus Campus Fellowship** ("RJCF") has student chapters at 23 universities and colleges, including student chapters at 14 state universities and colleges. Its purpose is to promote the teachings of Jesus Christ according to the Holy Bible through Bible study, campus activities and service to the campus community. RJCF student chapters have been threatened with denial of equal access to meeting space and funding because of their religious criteria for their leadership.

While welcoming all students to attend its meetings, its voting members must subscribe to the group's Doctrinal Statement of Commitment to Historic Christianity, as well as agree to live by the group's written standards of personal conduct.

The Bylaws of ReJOYce in Jesus Campus Fellowship at Georgia Institute of Technology, which is representative of the Bylaws of other RJCF student chapters, set forth its *Doctrinal Statement of Commitment to Historic Christianity by Voting Members,* as follows:

This organization affirms the Holy Bible as the authoritative revelation of God to man, inerrant in the original manuscripts. This organization seeks to maintain a climate of free inquiry, while also maintaining unity of its leadership within the broad context of Christian orthodoxy. To do so, this organization requires that any attending member who wishes to become a voting member of this organization shall also affirm this fact and shall subscribe to the following confession of Christian faith:

> "I confess and believe:
>
> "The Bible, Old and New Testaments, is God's divinely inspired Word;
>
> "The triune God – God, the Father, the Son, Jesus Christ, who is true God and true man, and God, the Holy Spirit, who is a divine personage;
>
> "All have sinned and come short of the glory of God and therefore all are in need of salvation;
>
> "Salvation has been provided for all mankind through Jesus Christ, who is the only way to the Father and the only way anyone may obtain eternal life;

"The virgin birth of Jesus Christ, and that He who knew no sin was made sin for us that we might be made the righteousness of God in Him;

"That Jesus, having paid for our sins, was raised bodily from the dead, and having washed those who believe in His own blood, became the first begotten of many brethren where He now sits at the right hand of the Father in heaven;

"It is the will of God for every believer to be filled with the Holy Spirit, anointed with His power, and doing the works of Jesus, according to John 14:12;

"Those who have received Jesus Christ as their personal Lord and have been born again are the Church, which is His body;

"There will be a bodily resurrection of both the just and the unjust: the just unto eternal life with God and the unjust unto eternal damnation with Satan and his followers;

"In water baptism and in the observance of the Lord's Supper;

"In the catching up of the Church, and the very soon visible return of the Lord Jesus Christ."

Article V of the Bylaws presents *Standards of Personal Conduct for Voting Members,* which includes:

Any person who desires to be a voting member of this organization shall agree to conduct himself or herself in accordance with the following standards of personal conduct set forth herein.

A. A voting member of this organization shall not commit those acts which are expressly forbidden in Scripture, including idolatry, premarital or extramarital sex, homosexual behavior, drunkenness, coveting, theft, profanity, occult practices and dishonesty. (Exodus 20:1-17; Lev. 18:22; Deut. 18:10-11; Rom. 1:18-32; I Cor. 5:9-13, 6:18-19; Eph. 5:1:12).

Amicus curiae **National Association of Evangelicals** ("NAE") is a nonprofit association of evangelical Christian denominations, churches, organizations, institutions, and individuals that includes more than 50,000 local churches from 74 different denominations and serves a constituency of over 20 million people. The NAE is committed to defending religious freedom as a precious gift of God and a vital component of our American heritage.

(14)

No. 03-956

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and CONNECTICUT RIVERS COUNCIL, BOY SCOUTS OF AMERICA,
Petitioners,

v.

NANCY WYMAN, in her capacity as Comptroller of the State of Connecticut and as a member of the Connecticut State Employee Campaign Committee, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*[1]

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all

[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. Consent to the filing of this brief has been granted by the parties. Their agreement to consent is enclosed with this brief.

the rights enumerated in the Bill of Rights and the 14th Amendment, not just those that might be politically correct for a time or fit a particular ideology. Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese, former Federal Appeals Court Judge Robert Bork, former Reagan White House Policy Advisor Robert Carleson, who also serves as the organization's chairman, former Director of the U.S. Commission on Civil Rights Linda Chavez, former Assistant Attorney General for Civil Rights William Bradford Reynolds, former Harvard University Professor James Q. Wilson, former Ambassador to Costa Rica Curtin Winsor, Jr., former Editor-in-Chief of the *Reader's Digest* and former Director of the USIA Kenneth Y. Tomlinson, and nationally syndicated columnist Joseph Perkins.

This is precisely the sort of case that is of interest to the ACRU, because we are most concerned about protecting those whose rights and liberties may be overlooked or infringed due to political correctness or other political bias. In this case, we are particularly concerned that the liberty interests of the Boy Scouts to promote their traditional moral values is properly understood.

SUMMARY OF ARGUMENT

Neither Federal, nor state, nor local governments, or any of their subdivisions, may penalize a private actor for exercising its Constitutional rights. This doctrine of unconstitutional conditions is well established in the law.

Yet, it is indisputable that the state of Connecticut through the Connecticut State Employee Campaign Committee ("State Committee") excluded the Boy Scouts from the Connecticut State Employee Campaign for Charitable Giving ("Charitable Campaign") precisely because of the exercise by the Boy Scouts of the exact constitutional rights upheld by this Court in *Boy Scouts of America v. Dale,* 530 U.S. 640,

644 (2000). The state, therefore, has undeniably penalized the Boy Scouts for exercising these precise Constitutional rights so recently recognized and upheld by this Court. But that penalty is clearly unconstitutional under the doctrine of unconstitutional conditions.

Consequently, the decision of the court below sharply conflicts with the numerous precedents of this Court and others on the unconstitutional conditions doctrine, and, therefore, merits review by this Court.

The court below upheld the exclusion of the Boy Scouts from the state employee charitable campaign because the purpose of the state's discrimination law was to punish the conduct of discrimination against homosexuals, not to punish any particular viewpoint or expression.

Yet that argument is inconsistent with *Dale, Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557 (1995), and the whole doctrine of freedom of expressive association. Every case of expressive association involves conduct bearing expression. If the state can freely regulate the conduct on the ground that its purpose is not to regulate speech, then the whole doctrine of expressive association will have been read out of the law.

Consequently, the decision of the court below directly conflicts with *Dale* and *Hurley*, and the whole doctrine of expressive association, and so, again, merits review by this Court.

There can be no question that the Boy Scouts were excluded from the Connecticut state employee charitable campaign because of their views and message concerning homosexual activity, reflected in their choice of leaders and members. If the Scouts dropped their position on homosexual activity, they would not have been excluded.

Exclusion of the Scouts based on such viewpoint discrimination is plainly unconstitutional under the precedents of this Court. The decision of the court below consequently conflicts with the precedents of this Court on viewpoint discrimination, and so, once again, merits review.

What is at stake in this case is the freedom of Americans to join together to defend, advocate, and teach traditional moral and religious values. That freedom is becoming so disfavored in state and local policies that we have reached the oppressive result so far in this case that organizations that approve of homosexual conduct as morally right are retained in the Connecticut Charitable Campaign as participants in good standing, but organizations that express the traditional moral view that homosexual activity is wrong are excluded as discriminatory groups not acceptable in polite society.

Millions and millions of Americans who believe in traditional moral and religious values are looking to this Court to uphold their Constitutional rights and equal treatment under the law. This case consequently involves critical First Amendment issues of national importance, and so, again, merits review by this Court.

ARGUMENT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS HOLDING THAT STATES CANNOT IMPOSE PENALTIES ON THE EXERCISE OF CONSTITUTIONAL RIGHTS.

Neither Federal, nor state, nor local governments, or any of their subdivisions, may penalize a private actor for exercising its Constitutional rights. As this Court said in *Perry v. Sinderman,* 408 U.S. 593, 597 (1972),

> "even though a person has no 'right' to a valuable government benefit and even though the government

> may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which (it) could not command directly.' Such interference with constitutional rights is impermissable."

(quoting *Speiser v. Randall,* 357 U.S. 513 (1958).

Similarly, in *Thomas v. Review Board* 450 U.S. 707, 716 (1981), this Court said, "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program." In *Speiser*, this Court said that for a state government to "deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for such speech. The appellees are plainly mistaken in their argument that because a tax exemption is a 'privilege' or 'bounty', its denial may not infringe speech" 357 U.S. at 518.

The Court applied this doctrine of unconstitutional conditions in *Healy v. James*, 408 U.S. 169 (1972). A Connecticut state college denied official recognition and access to university facilities to a student organization because it was affiliated with the national Students for a Democratic Society. The Court held this action unconstitutional as it violated the First Amendment's right of freedom of expressive association. The Court said, "Among the rights protected by the First Amendment is the right of individuals to associate to

further their personal beliefs." 408 U.S. at 181. The Court also said,

> "The Constitution's protection is not limited to direct interference with fundamental rights. . . . Freedoms such as these are protected not only against heavy handed frontal attack, but also from being stifled by more subtle government interference."

Id. at 183 (citations omitted).

In addition, in *Bd. of Comm'rs, Waubensee County v. Umbehr,* 518 U.S. 668 (1996), this Court said, "our modern 'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech' even if he has no entitlement to that benefit." *Id.* at 674. The Court also said, "constitutional violations may arise from the deterrent, or chilling, effect of governmental [policies] that fall short of a direct prohibition against the exercise of First Amendment rights." *Id.*

See, *Legal Services Corp. v. Velasquez*, 531 U.S. 533 (2001), (the Federal government may not deny Legal Services Corp. grants to lawyers because they refuse to agree not to bring legal challenges against the validity of welfare laws); *FCC v. League of Women Voters*, 468 U.S. 364 (1984)(grants cannot be denied to public broadcasters for refusing to agree not to engage in First Amendment protected editorializing); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990); *Planned Parenthood Federation of America, Inc. v. Agency for Intern. Development*, 915 F.2d 59 (2d Cir. 1990) *cert. denied* 500 U.S. 92 (1991)(Federal government refused to allow Planned Parenthood to participate in a Federal grant program unless it changed the organization's message to follow what Federal officials preferred the group to say); *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839 (2d Cir. 1996)(School district violated both Federal statute and Constitution in denying recognition and access to school

facilities to a student Christian Club on grounds that club's policy of allowing only Christians to serve as club officers violated school's antidiscrimination policy); *Cuffley v. Mickes*, 208 F.3d 702 (8th Cir. 2000), *cert. denied*, 532 U.S. 903 (2001); *Anderson v. McCotter*, 100 F.3d 723 (10th Cir. 1996); *Hyland v. Wonder*, 972 F.2d 1129 (9th Cir. 1992), *cert. denied*, 508 U.S. 908 (1993).

This unconstitutional conditions doctrine is fully dispositive of the present case, and requires reversal of the court below.

In *Boy Scouts of America v. Dale*, 530 U.S. 640, 644 (2000), this Court said, "The Boy Scouts is a private, not for profit organization engaged in instilling its system of values in young people. The Boy Scouts assert that homosexual conduct is inconsistent with the values it seeks to instill." The Court also said, "The Boy Scouts asserts that it 'teach[es] that homosexual conduct is not morally straight'. . . and that it does 'not want to promote homosexual conduct as a legitimate form of behavior,'. . ." 530 U.S. at 651.

In that case, the Boy Scouts dismissed James Dale as an adult scout leader because he had become an openly public, gay activist. Dale sued claiming discrimination under the state's public accommodations law, and the New Jersey Supreme Court upheld Dale's claim, ordering the Boy Scouts to reinstate him.

But this Court reversed. The Court held that applying the New Jersey discrimination law to the Boy Scouts in this way would violate the organization's right to expressive association under the First Amendment.

The Court explained that the First Amendment protects the right of the Boy Scouts to choose and send the message it desires, and to express and teach the values in which it believes. The Court recognized that forcing the Boy Scouts to accept publicly avowed, practicing homosexuals as

members and adult leaders would nullify it's message, teachings, and expression regarding its view of the morality and propriety of homosexual conduct. As the Court said,

> "Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express. . . .
>
> The forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."

530 U.S. at 648.

Yet, it is indisputable that the state of Connecticut through the Connecticut State Employee Campaign Committee ("State Committee") excluded the Boy Scouts from the Connecticut State Employee Campaign for Charitable Giving ("Charitable Campaign") precisely because of the exercise by the Boy Scouts of the exact constitutional rights upheld by this Court in *Dale*.[2] Consequently, the state has undeniably penalized the Boy Scouts for exercising these precise Constitutional rights so recently recognized and upheld by this Court.

But that penalty is unconstitutional under the doctrine and entire line of cases discussed in the previous section. A state, or any of its subdivisions, cannot penalize a private actor like the Boy Scouts for the exercise of its Constitutional rights.

The court below, in fact, even stated, "Connecticut has not prevented the BSA from exercising its First Amendment rights;" but under the state's exclusion of the Scouts from it's

---

[2] The court below even stated, "Consequently, given the procedural posture of this case, we must assume that the removal of the BSA from the Campaign was triggered at least to some extent by the BSA's exercise of what the Supreme Court has held to be a constitutionally protected right. App. at 18a.

employee charitable campaign, "the BSA pays a price for doing so." App. at 26a n.8. There could not be any more clear violation of the unconstitutional conditions doctrine.

The correct application of the law to closely analogous facts can be found in *Boy Scouts of America v. Till*, 136 F. Supp. 2d 1295 (S.D. Fla. 2001). In that case, a school district terminated its contract with the local Boy Scouts for use of school facilities. The district claimed that the Boy Scouts policy on homosexuals violated the district's policy prohibiting the use of school facilities by those that discriminate.

The court recognized that the Boy Scout organization has "a right to freedom of expressive association, which includes the right to exclude homosexuals as members or leaders in the organization." *Id.* at 1308. The court found that "it is because of the exercise of this right . . . that the school board seeks to ban the Boy Scouts from use of school facilities." *Id.* As a result, the court found that the exclusion of the Boy Scouts from school facilities was unconstitutional because "the School Board cannot punish another group for its own message" protected under the First Amendment. *Id.*

The court below went awry because it confused the doctrine of unconstitutional conditions with the separate line of cases sprouting from *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788 (1985). That case held that a government could exclude a potential participant from a limited public forum if the exclusion was reasonable and not viewpoint discriminatory. That is a sound rule for management of a limited public forum. But *Cornelius* is not an unconstitutional conditions case. The exclusion there did not involve penalizing a potential participant for the exercise of any constitutional right.

Nevertheless, the court below held that a government may penalize or punish the exercise of a constitutional right if it was reasonable and not viewpoint discriminatory in doing so. The opinion states,

> "In order to prevail, the BSA must establish two propositions. First, it must show that it was excluded from the Campaign because of acts protected by the First Amendment. . . . Second, assuming that the BSA's removal from the Campaign was a consequence of the BSA's exercise of its First Amendment right to expressive association, the BSA must establish that that removal violated the Constitution. . . . [T]he BSA must demonstrate that the Committee's decision to exclude it from the Campaign was either unreasonable or viewpoint discriminatory."

App. at 13a.

But the second prong of this test is not part of the doctrine of unconstitutional conditions. If the Boy Scouts were excluded from the Campaign because of acts protected by the First Amendment, then that alone rightly establishes a violation of law under the doctrine. That is what the doctrine of unconstitutional conditions is all about. If "the BSA's removal from the Campaign was a consequence of the BSA's exercise of its First Amendment right to expressive association", the Scouts do not have to go on to establish that this penalty or punishment for exercising their constitutional rights was either unreasonable or viewpoint discriminatory.

Those additional requirements are confused imports from the *Cornelius* case. The opinion reveals this confusion in saying,

> "Rather, this case appears to be governed by two lines of First Amendment cases. The first deals with non-public forums and is exemplified by *Cornelius*. . . .
>
> "The second relevant line of cases is often described as the doctrine of unconstitutional conditions, which

> holds that the government may not condition certain government benefits on the relinquishment of constitutional rights. . . .
>
> "The case before us lies at the intersection of these two lines of authority and it makes no difference under which line we analyze it. Whether viewed as denial of access to a nonpublic forum or as the denial of a government benefit, the BSA's exclusion is constitutional if and only if it was (1) viewpoint neutral and (2) reasonable."

App. at 20a.

The doctrine of unconstitutional conditions does not say that a government may penalize or punish the exercise of a constitutional right as long as it does so reasonably and without viewpoint discrimination. In *Perry*, a state college refused to renew the contract of a non-tenured professor because he publicly criticized the college's administration. There was no suggestion in that case that the violation could be cured by some sort of viewpoint neutral policy, perhaps prohibiting all public commentary, pro and con, from college faculty regarding the administration.

Similary, in *Bd. of Comm'rs, Waubensee County*, a County Board refused to renew the contract of a trash hauler because of the hauler's public criticism of the Board. Again, there was no indication that a viewpoint neutral prohibition on the exercise of Free Speech rights regarding the Board, pro and con, would have cured the problem.

A viewpoint neutral policy was, in fact, struck down by this Court *League of Women Voters*. In that case, the Court held that Federal grants cannot be denied to public broadcasters for refusing to agree not to engage in First Amendment protected editorializing.

In *Planned Parenthood Federation of America*, the court held unconstitutional a Federal policy excluding Planned

Parenthood from a Federal grant program unless the organization changed its message. Yet, that is exactly what the state of Connecticut has done here, openly stating that the Boy Scouts can participate in the workplace charitable campaign if they would only change their message.

Consequently, the decision of the court below sharply conflicts with the numerous precedents of this Court and others on the unconstitutional conditions doctrine, and, therefore, merits review by this Court.

II. THE DECISION BELOW CONFLICTS WITH *DALE* AND OTHER FREEDOM OF EXPRESSIVE ASSOCIATION CASES.

The court below upheld the exclusion of the Boy Scouts from the state employee charitable campaign because the purpose of the state's discrimination law was to punish the conduct of discrimination against homosexuals, not to punish any particular viewpoint or expression. App. at 22a, 24a-26a.

But the same argument could have been applied to *Dale*. The purpose of the state's discrimination law there was also to punish the conduct of discrimination against homosexuals, not any particular viewpoint or expression. If the argument of the court below is correct, then this Court in *Dale* would have held that the state's anti-discrimination statute was applicable to the conduct of the Scouts in choosing their leaders and members, even if that had a negative consequential effect on the expression of the Scouts.

But this Court rightly rejected that argument in *Dale*. While the Court expressly found that the purpose of the anti-discrimination law there was "to prevent discrimination", 530 U.S. at 656, it recognized that applying the law to conduct of the Scouts in choosing their leaders and members would prevent the organization from expressing it's chosen messages regarding homosexual conduct and traditional

moral values. The state would then be dictating that the group express different messages from the ones it had chosen. Clearly, that cannot be permissable under the First Amendment.

The point was made even more directly in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,* 515 U.S. 557 (1995). In that case, the organizers of an annual Irish parade excluded an Irish homosexual organization because the message of the organization was not a message the organizers wanted to include in their parade. The Court held that the choice of the parade organizers as to what messages they wanted to include in their parade was protected from the state anti-discrimination laws by the Constitution under the doctrine of expressive association.

The Court explicitly recognized that the state anti-discrimination law did "not, on its face, target speech, or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against individuals." 515 U.S. at 572. Nevertheless, the Court also recognized that allowing the state to regulate and restrict conduct with expressive content would in essence allow the state to regulate and restrict the expression and speech of the parade organizers, which is not permissible under the First Amendment.

Indeed, the argument of the court below that the state action here just punishes discriminatory conduct and does not regulate or restrict expression is contrary to the whole doctrine of expressive association. Every case of expressive association involves conduct bearing expression. If the state can freely regulate the conduct on the ground that its purpose is not to regulate speech, then the whole doctrine of expressive association will have been read out of the law. In all of these cases, the conduct is the speech, and the two cannot be separated. If the state is free to regulate and restrict

the conduct then it is free to regulate and restrict the speech, and can stifle and shut down organizations with messages the state does not favor.

Consequently, as the decision of the court below directly conflicts with *Dale* and *Hurley*, and the whole doctrine of expressive association, that decision merits review by this Court.

III. THE DECISION OF THE COURT BELOW CONFLICTS WITH *ROSENBERGER* AND OTHER CASES, AS THE STATE ACTION IN THIS CASE WAS VIEWPOINT DISCRIMINATORY

There can be no question that the Boy Scouts were excluded from the Connecticut state employee charitable campaign because of their views and message concerning homosexual activity, reflected in their choice of leaders and members. If the Scouts dropped their position on homosexual activity, they would not have been excluded.

Respondent Nancy Wyman, state Comptroller and a member of the governing board of the state charitable campaign, said, "If the BSA alters its position on sexual orientation . . . I would welcome it back into the Campaign." A853.[3] Similarly, the district court below said, "If the BSA changes its policy in the future and no longer discriminates, and attests to that in its application to the Committee, the Committee could legally allow them to participate. . . ." App. at 48a.

The record also reveals overt hostility among Connecticut officials involved in the exclusion of the Scouts to the views and message of the Scouts on homosexual conduct. One Commissioner on the Connecticut Human Rights Organiza-

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[3] Numbers preceded by A refer to the Joint Appendix before the Second Circuit below.

tion stated, "I take issue with an organization that almost teaches discrimination. Okay?" A451. Another Commissioner called the views of the Scouts "illegitimate." A400.

Exclusion of the Scouts based on such viewpoint discrimination is plainly unconstitutional under the precedents of this Court. *Rosenberger v. Rector & Visitors of the University of Virginia,* 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free School District,* 508 U.S. 384 (1993); *Good News Club v. Milford Central School,* 533 U.S. 98 (2001).

These cases, and additional precedents cited above, do not allow for a loophole providing that the state can penalize and suppress conduct carrying out the views and expressing the messages of the organization, as long as the purpose of this suppression is something other than viewpoint discrimination. The cases look at whether the penalty is imposed as a result of the organization's viewpoint, or, in other words, whether viewpoint discrimination has actually occurred. Indeed, conduct carrying out the views and expressing the messages of the organization is constitutionally protected under the First Amendment, the doctrine of unconstitutional conditions, and Freedom of Expressive Association, as discussed above.

The decision of the court below consequently conflicts with the precedents of this Court regarding viewpoint discrimination, and, therefore, merits review.

IV. THIS CASE PRESENTS CRITICAL ISSUES OF ONGOING NATIONAL IMPORTANCE CONCERNING THE FREEDOM OF AMERICANS TO JOIN TOGETHER TO ADVOCATE TRADITIONAL MORAL AND RELIGIOUS VALUES.

What is at stake in this case is the freedom of Americans to join together to defend, advocate, and teach traditional moral

and religious values. Their conduct in forming organizations to express such viewpoints is increasingly labeled as discrimination. If they try to hold such organizations together by only choosing as leaders and members those who believe in such values, they are increasingly told by their government that this amounts to a violation of local anti-discrimination laws, or at least that what they are doing is so socially unacceptable that they must be excluded from government programs and activities, and the public square.

As a result, in San Diego, because of the religious values of the Scouts, a Federal district court has held unconstitutional a lease of parkland to the Scouts for the building and maintenance at Scout expense of a first class campground open to the general public on an equal basis. *Barnes-Wallace v. Boy Scouts of America*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003). In Berkeley, nonprofit groups are allowed to berth their boats rent free at the City marina. But not the Boy Scouts, because they are a "discriminatory" organization for upholding traditional moral values concerning homosexual activity. *Evans v. City of Berkeley*, 127 Cal. Rptr. 2d 696 (Cal. Ct. App. 2002).

In Broward County, Florida, the school board banned the Scouts from the public schools on the grounds that they were a discriminatory organization for upholding traditional moral values regarding homosexual activity. It took a lawsuit by the Scouts to get their clear constitutional rights respected by local school officials. *Till, supra.* In New York, a college Christian group was told it was in violation of anti-discrimination requirements because it would not accept non-Christians as officers of the organization. Again, the students had to arrange a lawsuit to get their constitutional rights enforced. *Hsu v. Roslyn Union Free School Dist. No. 3*, 85 F. 3d 839 (CA2), *cert denied,* 519 U.S. 1040 (1996).

See, Thomas C. Berg, *Religious Liberty in America at the End of the Century*, 16 J.L. & Religion 187 (2001); Michael

S. Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on: Equal Access for Religious Speakers and Groups*, 29 U.C Davis L. Rev. 653 (1996); Stephen M. Bainbridge, *Student Religious Organizations and University Policies Against Discrimination on the Basis of Sexual Orientation: Implications of the Religious Freedom Restoration Act*, 21 J.C. & U.L. 369 (1994).

It is this same thinking that leads to the results so far in this case of leaving as participants in good standing in the Connecticut employee charitable campaign organizations expressing the view that homosexual activity is morally right, such as the Stonewall Foundation, the Lambda Legal Defense and Education Fund, and Parents, Families & Friends of Lesbians and Gays. But organizations that express the traditional moral view that homosexual activity is wrong, like the Boy Scouts, are excluded as discriminatory groups not acceptable in polite society.

The Boy Scouts of America is an organization run by parents and local community volunteers coming together to instruct young boys in the traditional moral values in which they believe. These values include the belief that homosexual activity is morally wrong, a common belief rooted in religious teachings going back thousands of years. To call this activity discrimination is overheated hyperbole by those who simply oppose these traditional moral beliefs. The Boy Scouts do not discriminate. They engage in the teaching of traditional moral values, a Constitutionally protected activity that a state may not prohibit or penalize.

Those with different beliefs have Constitutionally protected rights to start their own youth organizations teaching their preferred moral values. But they may not use the power of the state to impose their values and beliefs on those who disagree. This is an untenable result that has no roots in the will of the people.

If the Boy Scouts are a discriminatory organization because of these views, then so is the Catholic church and all Catholic schools. So are evangelical Protestant churches and their schools. So are the many organizations that have sprung up across the country to advance traditional moral values. If the Court does not address these issues now they will only become worse and worse.

Millions and millions of Americans who believe in traditional moral and religious values are looking to this Court to uphold their Constitutional rights and equal treatment under the law. For these reasons, the decision of the court below merits review.

CONCLUSION

For all of the foregoing reasons, *amicus curiae* American Civil Rights Union respectfully urges this Court to grant the requested writ of certiorari to the Plaintiffs in this action.

Respectfully submitted,

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IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA, ET AL.,

Petitioners,

v.

NANCY WYMAN,
COMPTROLLER OF THE STATE OF CONNECTICUT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF CITIZENS FOR THE PRESERVATION OF CONSTITUTIONAL RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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This amicus curiae brief is submitted in support of the First Amendment claim of the Boy Scouts.

INTEREST OF AMICUS CURIAE[1]

Citizens for the Preservation of Constitutional Rights ("CPCR") is a nonprofit corporation. Through its litigation activities, CPCR seeks to protect the constitutional rights of individual citizens against unlawful encroachment by the state. The Boy Scouts' First Amendment rights to freedom of speech and association are individual rights which fall squarely within the parameters of concern which form the basis for CPCR's existence and mission. "[R]ights created by the first section of the First Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."

Founding members of CPCR have litigated constitutional issues at every level of the state and federal system, including the United States Supreme Court. As counsel for petitioners in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston.*, 515 U.S. 557 (1995), CPCR has a special interest in preserving this Court's unanimous holding in that case.

STATEMENT OF THE CASE

Amicus adopts the statement of facts, constitutional provisions and statutes as set forth in the appeal brief for the Boy Scouts.

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[1] Counsel for the parties have consented to the filing of this *amicus* brief. Their joint notice of consent is on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part. Sean Brady contributed the printing costs associated with the preparation and submission of this brief for the Citizens for the Preservation of Constitutional Rights.

SUMMARY OF ARGUMENT

The Second Circuit's decision dismantles this Court's unanimous holding in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), by compelling the Boy Scouts to convey a message with which they disagree. In *Hurley* the Court unanimously held that requiring an organization of private citizens to include among its members a person or group imparting a message the organizers do not wish to convey violates the First Amendment. Likewise, the Boy Scouts merely seek to prevent their members from conveying a message they do not wish to convey. The Boy Scouts, like the parade organizers in *Hurley*, may exclude those members imparting a message the Scouts do not wish to convey because the First Amendment fully protects a speaker's autonomy to choose the content of his own message. Therefore, the State of Connecticut, in compelling the inclusion of an unwanted and antithetical message, violates the Boy Scouts' First Amendment guarantee of freedom of speech.

The Boy Scouts are in a nearly identical situation to the parade organizers in *Hurley*. Like the parade organizers, the South Boston Allied War Veterans Council ("Council"), the Scouts wish only to control the message that their own members convey. As a result, the Boy Scouts only exclude a member based on sexual orientation if that member *speaks* with a message that contradicts the message that the Boy Scouts wish to convey. The Scouts, like the Council, do not exclude any member merely on the basis of sexual orientation.

This distinction between (i) excluding members because of their particular messages, and (ii) excluding members merely on the basis of sexual orientation was instrumental in *Hurley*. There, the Court recognized that the Council did not seek to exclude homosexuals as such from participating in the parade. Rather, the Council only sought to prevent marchers from imparting a message the organizers did not

wish to convey. Similarly, the Boy Scouts do not discriminate against or exclude any scout merely on the basis of his or her sexual orientation. The Boy Scouts seek only to prevent a member from imparting an unwanted and antithetical message.

Thus, here, as in *Hurley*, the State is attempting to mandate that a private organization include speech with which it disagrees.[2] However, as this Court concluded in *Hurley*: "this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." 515 U.S. at 573. The Second Circuit's decision, which allows Connecticut to exclude the Scouts for speech covered by this "fundamental rule of protection," is thus not only an affront to the First Amendment, but a direct challenge to this Court's unanimous holding in *Hurley*. The decision, if not reversed, will have profound effects upon the exercise of First Amendment rights, not only within Connecticut, but within other state and federal jurisdictions.

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[2] The result in *Hurley* would have been exactly the same whether (i) the State mandated that the Council include the Irish-American Gay, Lesbian and Bisexual Group ("GLIB") and its message in the Council's parade, or (ii) the State denied the Council a parade permit unless it included GLIB and its message. Both constitute compelled speech. *See infra* I.3. Similarly, the State's action would also have constituted compelled speech if the State had attempted to charge the Council different prices for a parade permit depending on whether or not the Council included GLIB and its message.

ARGUMENT

I. The Decision Below Conflicts With This Court's Unanimous Decision in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* and Other Cases Protecting the First Amendment Right of the Boy Scouts to Exclude Speech With Which the Scouts Disagree.

The Second Circuit's decision directly contradicts *Hurley*. The court below failed to grasp that, like the Council in *Hurley*, the Boys Scouts do not exclude anyone merely on the basis of sexual orientation. Rather, the Boy Scouts only exclude a member for conveying a message the Scouts do not wish to convey. Yet the Supreme Court emphasized in *Hurley* that a speaker's autonomy includes the right to exclude members who convey an unwanted and antithetical message. This Court explicitly stated that the First Amendment fully protects a speaker's "autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573. As a result, the Court unanimously held that requiring "private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey" violates the First Amendment. *Id.* at 559. Thus, requiring the Boys Scouts to include members who convey a message the organizers do not wish to express clearly violates the First Amendment and directly contradicts *Hurley*.

A. The Boy Scouts Merely Seek To Prevent Their Members From Conveying A Message The Scouts Do Not Wish To Convey.

The Second Circuit confused the Boy Scouts' message with the sexual orientation of the group's members. The Boy Scouts seek only to prevent a member from conveying a message the group does not wish to convey. The Boy Scouts

do not exclude any scout merely on the basis of sexual orientation. Indeed, the Court of Appeals did not dispute the fact that the Boy Scouts do not discriminate on the basis of sexual orientation as such. *See Boy Scouts of America v. Wyman*, 335 F.3d 80, 85 (2d Cir. 2003) (quoting a letter from the Boy Scouts which stated their policy as not registering "*avowed* homosexuals" as adult volunteer leaders or youth members but that "other jobs within scouting are open to known or avowed homosexuals") (emphasis added). It is only when a member verbalizes a message that the Boy Scouts do not wish to convey that the Boy Scouts take any action at all. *See* A 1075 ("Boy Scouting makes no effort to discover the sexual orientation of any person. Scouting's message is, however, compromised when [messages] inconsistent with BSA standards" are conveyed.). Thus, the Boy Scouts only exclude a member on the basis of a conveyed message that is antithetical to the Boy Scout Oath and the Boy Scout Law—two of the fundamental ways in which the Scouts express their fundamental values and ideas. *See Boy Scouts of America v. Dale*, 530 U.S. 640, 649 (2000) (quoting the Boy Scouts mission statement, which states: "The values we strive to instill are based on those found in the Scout Oath and Law"); *see also id.* at 641 ("The Boy Scouts asserts that homosexual conduct is inconsistent with the values embodied in the Scout Oath and Law, particularly those represented by the terms "morally straight" and "clean," and that the organization does not want to promote homosexual conduct as a legitimate form of behavior. The Court gives deference to the Boy Scouts' assertions regarding the nature of its expression.") (citing *Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 123-24 (1981)).

In *Hurley* the Supreme Court acknowledged this same distinction between (i) excluding members because of their particular messages, and (ii) excluding members merely on the basis of sexual orientation. The Court noted that the Council did not seek to exclude homosexuals from

participation in the parade. *See Hurley*, 515 U.S. at 572 ("Petitioners disclaim any intent to exclude homosexuals as such, and no individual member of GLIB claims to have been excluded from parading as a member of any group that the Council has approved to march."). The Council only sought to prevent marchers from carrying a banner whose message the Council did not wish to convey. *See id.* at 573 ("[T]he disagreement goes to the admission of GLIB as its own parade unit carrying its own banner."); *see also New York County Bd. of Ancient Order of Hibernians v. Dinkins*, 814 F. Supp. 358, 362 (S.D.N.Y. 1993) (concluding that, because the Ancient Order of Hibernians ("AOH") allows "marchers whose sexual orientation is different from that approved of by the AOH to march in the Parade without a banner as guests of the various Parade contingents[,] . . . the true reason the AOH and the Parade Committee seek to exclude ILGO [the Irish Lesbian and Gay Organization] is because ILGO would insist on marching under a separate banner that would, in effect, identify the AOH as condoning sexual practices contrary to the message that the AOH believes the Parade should convey.").

In fact, the Supreme Court in *Hurley* agreed that it was clearly erroneous to equate exclusion on the basis of a group's message with exclusion on the basis of its members' sexual orientation. Justice Souter approvingly quoted the dissenting opinion of Massachusetts Justice Nolan. *See Hurley*, 515 U.S. at 565-66. Like the unanimous Supreme Court, Justice Nolan had also concluded that the Council's message was protected under the First Amendment because exclusion on the basis of a message was fundamentally different from exclusion based on sexual orientation. *See id.* at 565 ("[Justice Nolan] found clear error in the trial judge's equation of exclusion on the basis of GLIB's message with exclusion on the basis of its members' sexual orientation. To the dissent this appeared false in the light of 'overwhelming evidence' that the Council objected to GLIB on account of its message and a dearth of testimony or documentation

indicating that sexual orientation was the bar to admission.") (quoting *Irish-American Gay, Lesbian & Bisexual Group of Boston v. City of Boston*, 636 N.E.2d 1293, 1304 (Mass. 1994)). The Supreme Court has therefore emphasized this distinction between exclusion on the basis of a message and exclusion on the basis of sexual orientation.

Furthermore, the trial court in *Hurley* acknowledged, and this Court affirmed, that homosexuals' self-identification is a viewpoint that private associations have a constitutional right to exclude. 515 U.S. at 574 (holding that "the presence of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals"). Justice Souter reiterated that the trial court had "found the Council's 'final position [to be] that GLIB would be excluded *because of its values and its message, i.e., its members' sexual orientation.*'" *Id.* at 562 (emphasis added) (quoting *Irish-American Gay, Lesbian & Bisexual Group of Boston v. City of Boston*, No. 92-1518, 1993 Mass. Super. LEXIS 320, 324 n.5 (Mass. Super. Ct. Dec. 15, 1993)) (citing Tr. of Closing Arg. 43, 51-52 (Nov. 23, 1993)).

Thus, the Supreme Court has recognized that self-identification of one's sexual orientation through speech necessarily conveys a distinct message and a particular viewpoint. Excluding a person because of a message that is conveyed through speech (i.e., through self-identification of one's sexual orientation) should therefore be understood as completely distinct from excluding a person merely on the basis of his or her sexual orientation. The Boy Scouts, however, only exclude a member if he or she speaks a message with which the Scouts disagree.[3]

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[3] Under Connecticut's supposed rationale for excluding the Boy Scouts, it is inexplicable how the State was able to distinguish between the Boy Scouts and the Connecticut Stonewall Foundation, another organization in the State Employee Charitable Campaign, if the State was actually applying *Hurley* consistently. In a deposition at the trial level, testimony from Leslie Brett (former Chair of the Connecticut Commission on Human Rights & Opportunities

B. The Boy Scouts, Like the Council in *Hurley*, May Exclude Those Members Imparting a Message the Scouts Do Not Wish to Convey Because the First Amendment Fully Protects a Speaker's Autonomy To Choose the Content of His Own Message.

The Boy Scouts may exclude those members imparting a message the Scouts do not wish to express. As this Court emphasized in *Hurley*, the First Amendment fully protects a speaker's "autonomy to choose the content of his own message." 515 U.S. at 573. In *Hurley* the Council exercised this autonomy to choose the content of its message by excluding participants who conveyed an antithetical message. But as demonstrated in I.A. above, the Boy Scouts take the exact same action as the Council in *Hurley*. Both organizations only exclude a member or participant who conveys an antithetical message. Therefore, in restricting the Scouts' "autonomy to choose the content of [their] own message," Connecticut violates the First Amendment. The Second Circuit's decision thus dismantles this Court's unanimous holding in *Hurley* that the state cannot compel an organization of private citizens to include members who express a viewpoint or message with which the speaker disagrees. 515 U.S. at 559.

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and a member of the Stonewall Foundation) indicated that the Stonewall Foundation was *not* excluded from the Charitable Campaign, even though people opposed to homosexuality are not allowed to present Stonewall's message, on the basis that Stonewall has both heterosexual and homosexual members. *See* A 352-53 (stating that the Stonewall Foundation has "not knowingly" ever [accepted] a member who was opposed to gay or lesbian rights and that if they knew: "We wouldn't include that person in our activities *speaking* or educating the public. . . . We wouldn't let that person *speak* or represent the Stonewall Foundation.") (emphasis added). But this policy is exactly the same as the Boy Scouts' policy. The Boy Scouts have both heterosexual and homosexual members, but advocates of homosexuality are not allowed to present the Boy Scouts' message. The two organizations' policies regarding speech, membership, and advocacy are thus indistinguishable.

As the Court emphasized in *Hurley*, the State cannot abridge free speech rights even in the name of preventing discrimination. The Second Circuit, however, has held that Connecticut's decision to exclude the Boy Scouts from its State Employee Charitable Campaign for alleged violations of Connecticut's Gay Rights Law does not violate the Scouts' First Amendment rights. *Wyman*, 335 F.3d at 99; Conn. Gen. Stat. § 5-262(a)(3) (1998); *id.* at § 46a-81. In so holding, the Second Circuit ignored the distinction in *Hurley* between exclusion from participation based on sexual orientation and exclusion of a particular message. *Hurley*, 515 U.S. at 559. As stated in I.A above, the court in *Wyman* did not even dispute the fact that the Boy Scouts do not discriminate on the basis of sexual orientation as such. *See Wyman*, 335 F.3d at 85; *see also Dale*, 530 U.S. at 651-53. However, the Second Circuit ignored the fact that the Boy Scouts only prohibit a person from participating if that person expresses a viewpoint contrary to the Boy Scout Oath and Boy Scout Law. As counsel for the Boy Scouts said in oral argument in *Dale*, the scoutmaster "put a banner around his neck" by expressing ideas that the Boy Scouts do not wish to convey. 530 U.S. at 696. The Second Circuit in *Wyman* therefore commits the error that concerned this Court in *Hurley*—namely, abridging the speech rights of private citizens in the name of preventing discrimination. This the First Amendment does not allow.

The Boy Scouts, like the Council in *Hurley*, may exclude those members imparting an antithetical message because the First Amendment fundamentally protects a speaker's "autonomy to choose the content of his own message." *Hurley*, 515 U.S. at 573. The Court in *Hurley* explicitly rejected the lower court's supposed justifications for altering the content of a private organization's message. *Id.* (chastising an "approach" in which "any contingent of protected individuals with a message would have the right to participate in petitioners' speech, so that the communication produced by the private organizers would be shaped by all

those protected by the law who wished to join in with some expressive demonstration of their own"). The Supreme Court declared that "this use of the State's power violates the fundamental rule of protection under the First Amendment, *that a speaker has the autonomy to choose the content of his own message.*" *Id.* (emphasis added); *see also Riley v. National Federation of the Blind*, 487 U.S. 781, 790-91 (1988) ("The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how they want to say it."); *Meyer v. Grant*, 486 U.S. 414, 424 (1988) ("The First Amendment protects the [petitioners'] right not only to advocate their cause, but also to select what they believe to be the most effective means for so doing.").

The Boy Scouts, therefore, like the Council in *Hurley*, have the same First Amendment autonomy in choosing their own message. *See Hurley*, 515 U.S. at 574. The Boy Scouts and the Council are like authors or composers. Under the First Amendment, they all have the autonomy to choose the message that their group, their parade, their book, or their symphony conveys. *See id.* ("Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day."). The State may not add one sentence to an author's book, may not insert one note to a composer's symphony, and likewise may not compel the Boy Scouts to include a member who conveys an unwanted and antithetical message. *See id.* ("[T]he Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.").

Indeed, this Court's unanimous decision in *Hurley* made clear that, because a speaker has the autonomy to choose his own point of view, a speaker may exclude those with

contrary messages *for whatever reason*. *See Hurley*, 515 U.S. at 574-75. The Court stated:

> The parade's organizers may not believe these facts about Irish sexuality to be so, or they may object to unqualified social acceptance of gays and lesbians or have some other reason for wishing to keep GLIB's message out of the parade. *But whatever the reason, it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.*

Id. (emphasis added).

As a result, a private organization's exclusion of certain members on the basis of the message that those members are conveying is protected by the First Amendment. This protection of *speech* is fundamental and was determinative in *Hurley*. A private organization's exclusion of certain members with whom the organization does not wish to *associate* may or may not receive constitutional protection depending on the case. *Compare Boy Scouts of America v. Dale*, 530 U.S 640, 655 (2000) (holding that a state may not prohibit the Boy Scouts from adhering to their viewpoint as expressed in their internal leadership policy) *with Roberts v. United States Jaycees*, 468 U.S. 609, 627 (1984) (holding that compelling the Jaycees to admit women did not violate freedom of association if admission of women did not "impede the organization's ability . . . to disseminate its preferred views"). In contrast, this Court has unanimously held that a private organization's exclusion of certain members on the basis of the *speech* that those members are conveying definitely receives First Amendment protection. *See Hurley*, 515 U.S. at 559 ("The issue in this case is whether Massachusetts may require private citizens who organize a parade to include among its marchers a group

imparting a message the organizers do not wish to convey. We hold that such a mandate violates the First Amendment.").[4]

C. Because the Boy Scouts Have the Autonomy To Choose the Content of Their Own Message, the State, in Compelling the Inclusion of an Unwanted and Antithetical Message, Violates the Boy Scouts' First Amendment Guarantee of Freedom of Speech.

Connecticut violates the Boy Scouts' freedom of speech because the State compels the Scouts to include an unwanted and antithetical message. *Hurley* and a long series of compelled speech cases indicate that the autonomy to convey a message necessarily includes freedom from compelled speech. In *Hurley*, the Court held that forcing the Boy Scouts to include GLIB compelled the Boy Scouts to alter their message. Yet the result in *Hurley* would have been exactly the same if the State had denied the Council a parade permit because of the Council's refusal to include GLIB. Both instances constitute compelled speech. Similarly, here, the State of Connecticut's action constitutes compelled speech of the Boy Scouts whether (i) the State allows the Boy Scouts to participate in the State Employee Charitable Campaign but mandates the inclusion of individuals with an antithetical message, *or* (ii) the State denies the Boy Scouts access to the State Employee Charitable Campaign for refusing to include individuals with an antithetical message.

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[4] Of course, the distinction between the Court's treatment of free association and free speech does not preclude the possibility that a State is simultaneously violating both. For instance, this *amicus* argues that Connecticut violates the Boy Scouts' freedom of speech, but believes that Connecticut's actions actually violate both of these fundamental constitutional rights. *Cf. New York County Bd. of Ancient Order of Hibernians v. Dinkins*, 814 F. Supp. 358, 368 (S.D.N.Y. 1993) (finding it unnecessary to rule on the issue of freedom of association but acknowledging "there may well be substance to this argument" after deciding the case on the basis of freedom of speech).

Either way the State's action constitutes compelled speech under *Hurley*.[5] *See Hurley*, 515 U.S. at 563 (rejecting as unconstitutional the lower court's supposed justification that "because the state did not mandate inclusion of GLIB but only prohibited discrimination based on sexual orientation" the "infringement" on the First Amendment was only "incidental"); *see also infra* I.4.

Writing for the Court in *Hurley*, Justice Souter emphasized that forcing a particular view onto a speaker clearly violates the speaker's autonomy to convey his own message. *See Hurley*, 515 U.S. at 576 ("[W]hen dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised."); *see also Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 16 (1986) (plurality opinion) ("[If] the government [were] freely able to compel . . . speakers to propound political messages with which they disagree, . . . protection [of a speaker's freedom] would be empty, for the government could require speakers to affirm in one breath that which they deny in the next.").

Justice Souter emphasized the importance of the speaker's First Amendment right not to convey a message that he does not want to express. *See Hurley*, 515 U.S. at 573 ("'Since *all* speech inherently involves choices of what to say and what to leave unsaid,' . . . one important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'") (quoting *Pacific Gas & Electric Co.*, 475 U.S. at 11, 16); *id.* ("[The State] may not

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[5] Imagine, for example, if the State mandated that a person must say "I love Democrats" or "I love Republicans" in order to vote or if a person had to salute the flag in order to have access to a public park. Such mandates constitute compelled speech whether or not the person decides to vote or use the park. Or suppose that the State implemented an eighty percent tax on everyone but would reduce the tax to twenty percent for any citizen willing to state a certain message. The State could not argue that, because citizens remain "free" not to make the statement, this scheme would not constitute compelled speech.

compel affirmance of a belief with which the speaker disagrees . . . .") (citing *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943)).

Moreover, the very purpose of the First Amendment is to foreclose public authorities from assuming a guardianship of the public mind. *Thomas v. Collins*, 323 U.S. 516, 545 (1945); *see also Wallace v. Jaffree*, 472 U.S. 38, 48-55 (1985) (First Amendment adopted to curtail power of Congress to interfere with individual's freedom to "express himself in accordance with the dictates of his own conscience"); *Barnette*, 319 U.S. at 642 ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."); *New York County Bd. of Ancient Order of Hibernians v. Dinkins*, 814 F. Supp. 358, 369 (S.D.N.Y. 1993) ("Such activity (telling citizens what they must think and how they must express themselves) is something one would expect from the 'Thought Police' described by George Orwell. The humor of naming the thought police the 'Human Rights Commission' is particularly Orwellian.").

Just as selective exclusion from a public forum by the State may not be based on content, *Chicago Police Dept. v. Mosley*, 408 U.S. 92 (1972), neither may a citizen be compelled to express the ideological views of the state. *See Wooley v. Maynard*, 430 U.S. 705, 717 (1977) ("[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."); *see also Redgrave v. B.S.O.*, 855 F.2d 888, 906 (1st Cir. 1988), *cert. denied*, 488 U.S. 1043 (1988) ("We have been unable to find any case, involving the arts or otherwise, in which a state has been allowed to compel expression.").

Indeed, this Court has repeatedly emphasized that the State is just as constrained in mandating speech as it is in

prohibiting speech. *See Riley*, 487 U.S. at 796-97 ("[I]n the context of protected speech, the difference [between compelled speech and compelled silence] is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."); *Wooley*, 430 U.S. at 714 ("We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.") (quoting *Barnette*, 319 U.S. at 637); *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974) (Requiring newspapers to give equal reply space to those they editorially criticize "operates as a command in the same sense as a statute or regulation forbidding appellant to publish a specified matter.").

Thus, *Hurley* and the Court's other compelled speech precedents indicate that a speaker's autonomy to convey a message necessarily includes freedom from compelled speech. In compelling the inclusion of an unwanted and antithetical message, the State of Connecticut is thus violating the Boy Scouts' First Amendment guarantee of freedom of speech. The United States Supreme Court has already held that "[c]ompelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set. . . . The Commission's order also impermissibly requires an appellant to associate with speech with which appellant may disagree." *Pacific Gas & Electric Co.*, 475 U.S. at 9, 15. However, "impermissibly requir[ing] an appellant to associate with speech with which appellant may disagree" is exactly what Connecticut is attempting to do by requiring the Boy Scouts to include speakers with which they disagree.

D. The Second Circuit's Rationale That the Boy Scouts Must "Pay-a-Price" For Speech Has Already Been Rejected Explicitly In *Hurley*.

The Second Circuit's supposed rationale that the Boy Scouts must "pay-a-price" for exercising their First Amendment rights has already been rejected in *Hurley*. The Second Circuit admits that its interpretation "may be cold comfort to those whose expression the law, in practice, limits." *Wyman*, 335 F.3d at 95 n.8. However, the Second Circuit then asserts that the speech restriction is justified because "Connecticut has not prevented the BSA from exercising its First Amendment rights; it has instead set up a regulatory scheme . . . under which, as it happens, the BSA *pays a price* for doing so." *Id.* (emphasis added).

Yet the Supreme Court unanimously rejected this "pay-a-price" for speech rationale when the lower court in *Hurley* also offered it as a supposed justification for restricting First Amendment rights. The Court stated in *Hurley*: "[t]he court [below] held that because the statute did not mandate inclusion of GLIB but only prohibited discrimination based on sexual orientation, any infringement on the Council's right to expressive association was only 'incidental' and 'no greater than necessary to accomplish the statute's legitimate purpose' of eradicating discrimination." *Hurley*, 515 U.S. at 563 (citation omitted). However, the Supreme Court unanimously reversed this decision. The reversal illustrates this Court's emphatic rejection of the constitutionality of this "pay-a-price" rationale for restricting First Amendment rights.

The "pay-a-price" for speech rationale must fail even though some incidental restrictions on speech have been upheld where the purpose of the restriction is unrelated to the content of the expression. *See Ward v. Rock Against Racism*, 491 U.S. 781, 781 (1980). These incidental restrictions on protected speech, however, are only justified if they are content-neutral. The government may not consider either the

content or subject matter of the speech. *See Consolidated Edison Co. of N.Y. v. Public Service Comm'n*, 447 U.S. 530, 536 (1980); *see also Hudgens v. N.L.R.B.*, 424 U.S. 507, 520 (1976) ("Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). Here, however, the State has attempted impermissibly to change the communicative message of the Boy Scouts by requiring them to include scouts who convey a message that is antithetical to the Scout Oath and Scout Law. Because these conditions can hardly be confused with time, place, or manner restrictions, they violate the First Amendment.

Furthermore, proscribing the Boy Scouts from excluding certain messages would lead people to believe that the Boy Scouts actually endorse those ideas. There is no customary practice in which the Boy Scouts disavow the views of individual scouts. It would be just as impracticable for the Boy Scouts to disavow every viewpoint expressed by individual scouts as the Court recognized it would be for the Council in *Hurley* to disavow every viewpoint of parade participants. *See Hurley*, 515 U.S. at 576-77 ("Although each parade unit generally identified itself, each is understood to contribute something to a common theme, and accordingly there is no customary practice whereby private sponsors disavow 'any identity of viewpoint' between themselves and the selected participants. Practice follows practicability here, for such disclaimers would be quite curious in a moving parade."). *But cf. Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 655 (1994) ("[T]here appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator."); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980) (The owner of a shopping mall "can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand."). Each Scout who wears the Boy Scout uniform and speaks affects the

overall message of the Boy Scouts. *Cf. Hurley*, 515 U.S. at 572-73 ("Since every participating unit affects the message conveyed by the private organizers, the state courts' applications of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade."); *id.* at 577 ("Without deciding on the precise significance of the likelihood of misattribution, it nonetheless becomes clear that . . . [the] overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole."). Thus, prohibiting the Boy Scouts from excluding certain messages would lead people to believe erroneously that the Boy Scouts actually endorse those ideas.

Finally, like the Council in *Hurley*, the Boy Scouts do not forfeit the protection of the First Amendment even if the Scouts' message regarding sexual orientation is not the exclusive subject matter of their speech. *See Hurley*, 515 U.S. 569-70 ("[A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech."). Indeed, the First Amendment protection of a speaker's autonomy to choose the content of his own message does not even depend on the relative clarity of the message. See *id.* at 569 ("[A] narrow succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' . . . would never reach the unquestionably shielded painting of Jackson Pollock, the music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll.") (citation omitted).

Thus, as *Hurley* demonstrates, the Second Circuit's "pay-a-price" for speech rationale is unconstitutional; it is impracticable for the Boy Scouts to disavow the viewpoints of its individual members; and the First Amendment protects the Boy Scouts' choice of message even if that message is not the exclusive subject matter of their speech. The Boy Scouts' freedom of speech, like the Council's freedom of

speech in *Hurley*, cannot be limited by any of these supposed justifications. Overall, the Boy Scouts' fundamental autonomy to choose the content of their own message, including the right to exclude members who convey an antithetical message, is protected by the First Amendment and this Court's unanimous decision in *Hurley*.

The decision in *Wyman*, if not reversed, will have profound effects upon the exercise of First Amendment rights, not only within Connecticut, but within other state and federal jurisdictions. There are 150 charitable campaigns run by states, public universities, and local governments. More than 140,000 charities participate. Furthermore, if the Second Circuit's decision is allowed to stand, any State could mandate that a citizen or group must convey a certain message in order to receive any public benefit including not only parade permits and access to charitable campaigns but also access to public parks, access to civic facilities, access to welfare, Medicare, Medicaid, and Social Security benefits, and possibly even access to voting.

The words of Massachusetts Justice Nolan are just as applicable to the Second Circuit's decision in *Wyman* as they were when he wrote them about the lower court's decision in *Hurley* before its unanimous reversal:

> Today will be regarded as a sad and frustrating day in the history of the First Amendment to the United States Constitution. Today, a majority of this court upholds, and thereby endorses, a trial judge's flagrant violation of the free speech rights of citizens of this Commonwealth. The majority acquiesces in a judge's order instructing a private group that if it wishes to express itself at all, it must include in its expression a particular idea, one with which the group does not agree. One must strain to recall or even to

> imagine such an obvious violation of the revered rights to free speech.

Irish-American Gay, Lesbian & Bisexual Group of Boston, 636 N.E.2d at 1301 (Nolan, J., dissenting).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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